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BOSTON AND NEW YORK

ESSAYS ON GOVERNMENT

BY

A. LAWRENCE LOWELL

BOSTON NEW YORK CHICAGO
HOUGHTON MIFFLIN COMPANY
The Riverside Press Cambridge

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ESSAYS ON GOVERNMENT.

INTRODUCTION.

Jusqu'à présent, je n'en ai guère trouvé qu'un [principe politique], si simple qu'il semblera puéril et que j'ose à peine l'énoncer. . . . Il consiste tout entier dans cette remarque qu'une société humaine, surtout une société moderne, est une chose vaste et compliquée. — TAINE, *Les Origines de la France contemporaine: La Revolution*, vol. ii., Préface.

ANY one who attempts to study a carpet loom, or even an ordinary steam engine, when at rest, will find its mechanism hard to understand. He may examine the several parts; note their size and shape, and the materials of which they are made; but unless he watches them in motion he will not easily appreciate their bearing upon one another, or their functions in the working of the machine. The same principle applies to the study of politics, for the real mechanism of a government can be understood only by examining it in action. It has, indeed, been far too common to study the constitutions of various countries statically, if I may use the term; and this has led to a

habit of describing the nature, composition, and powers of the different factors in the government without seeking to know the actual scope of their several operations, or the extent of their control over one another. Such a method of proceeding is very much like examining the parts of a steam engine separately, and describing the piston, for example, as a bar of steel so many feet long and so many inches in diameter, without referring to the fact that it works only in and out of the cylinder and owes its motion to the head of steam. It was the study of the British government in its actual working which led Bagehot to remark that while the nature and legal attributes of king, lords, and commons had been correctly described, their functions were entirely misconceived. He saw that the crown, while still possessing in the eye of the law all the powers formerly ascribed to it, had long ceased to use them at pleasure, and, like the piston of the steam engine, was guided and controlled by other forces.

A knowledge of the actual working of a political system is essential, therefore, in order that its real mechanism may be understood. This is the first step in the study of a government; but it is only the first step, because a political system is not a mere machine which

can be constructed on any desired plan, and the parts of which can be adjusted according to the fancy of the designer. It is far more than this. It is an organism; and in order to appreciate its possible forms and the causes of its development, stability, or decay, it is necessary to investigate the laws of its organic life. The mythology of the ancient world is crowded with strange beings of all conceivable forms, — half bird, half beast; half man, half fish or brute. These creatures were made by putting together in one body the members of different animals, and were supposed in this way to combine their various advantages. A being was thus imagined which could run like a horse and fly like a bird, or use its hands like a man; but a zoölogist would have no hesitation in pronouncing all such creatures impossible, because the presence in their bodies of one set of organs would prevent the existence, or at least the effective service, of the others.

Perhaps this can be made clearer by an illustration from astronomy, a science which, in the present condition of our knowledge, is far more exact. Here again the ancients were not afraid to take liberties with nature, for when a hero died they were in the habit of creating in his honor an appropriate star; but an astronomer would tell you that such conduct would infal-

libly disturb the peace of the sky. He would tell you that a new planet would attract, and be attracted by, all the older ones, and would modify the course of every one of them. He might even be able to calculate the perturbations that would result in the celestial orbits, but in any case he would tell you that the path of every star would change until the universe adjusted itself to a new equilibrium of forces. All this is no less true of the life of political bodies than it is of the march of the stars, because a government is an organism whose various parts act and react upon one another; and it follows that a change in any one of them will cause changes more or less great in all the others until the system settles down with a new balance of forces. In order to understand the organic laws of a political system, it is necessary to examine it as a whole, and seek to discover not only the true functions of each part, but also its influence upon every other part, and its relation to the equilibrium of the complete organism.

It is in the light of this conception that I have tried to study the government of the United States in the first three of these essays. I have, however, confined my attention mainly to a single point of view, that of the limitation of legislative power and the protection of pri

vate rights; and even from this point of view I have not attempted anything like a systematic treatise, but have ventured only to touch upon some of the more prominent features of the subject. These essays were, in fact, written at different times, and their method is therefore fragmentary; but as I have thought it better to leave them in their original form, it may not be improper to say a few words to explain them, and to point out their connection with each other.

In the first essay the English and American forms of government are compared, for the purpose of showing that their natures are radically different; and an attempt is made to prove that cabinet responsibility, that central feature of the English system, is not in harmony with our institutions, and could not be introduced into the United States without destroying the entire fabric of the constitution. It would not have been out of place to discuss in this connection the suggestion so often made here, of giving to cabinet officers seats in Congress without votes. But the question of their having votes or not is really quite entirely immaterial, so far as the general effect on the form of our government is concerned, because ministerial responsibility can exist as completely when the cabinet officers have no votes as when they are for all purposes

members of the legislature; and evidence of this may be found in several of the parliamentary governments on the continent of Europe. It would be possible, I think, to show that this plan would either result in a full-fledged responsible ministry, or produce little or no effect, whether for good or for evil, and result in nothing at all. The advocates of such a change claim for it all the advantages without any of the perils of cabinet government, whereas it is clear that none of the benefits they expect from it — such as a close coöperation of the legislature and the executive; a recognized leadership in Congress; a centralization of political responsibility in the hands of a few men, or rather of one group of men, whose motions the nation can easily follow, and upon whom it can pass judgment at a stroke, — none of these results could be obtained unless the cabinet officers in taking their seats became the responsible leaders of Congress in the strict parliamentary sense. A discussion of this question would, however, throw little additional light upon the nature of our political system; and I speak of it here because the essay has been criticised on the ground that I had misunderstood this suggestion, and wasted powder in attacking a proposal which had never been made, at least never in a practical form.

In the second essay the English and American forms of government are further compared, but in a somewhat different manner. The effect that each of them is adapted to produce in a democratic country upon the limitation of popular power and the protection of private rights is considered, and from this point of view an inquiry is made into the structure of our government and the laws of its organic life.

The third essay was originally written for a law review, and treats of the position and functions of the legal profession in our political system.

In the last two essays the limitation of political power is considered from a philosophical standpoint. The first of these deals only with the theory of the social compact; but this is almost equivalent to a sketch of the history of modern political philosophy to the end of the last century, because until that time all modern speculation upon government found its expression in some form of this theory, except among those publicists, ever decreasing in numbers and influence, who advocated the doctrine of the divine right of kings. It is therefore a very significant fact that the writers upon this theory are divided into two schools, one of which used it to prove that the power of the state must be absolute, while the other drew

from it the conclusion that the authority of government is necessarily limited by the natural rights of individuals; and it is no less important to observe that these two classes of opinion do not correspond with any bias in favor of monarchy or of popular government.

The final essay, upon the abstract doctrine of the limitation of sovereignty, is intended chiefly for students of jurisprudence.

Throughout these essays I have tried to preserve a scientific spirit, and to study different political systems, without weighing their respective advantages, or expressing a preference for any of them. For this reason I have avoided all discussion of the merits of that belief in the sacredness of personal liberty and private rights on which the American constitutions are in large measure based, but in the Introduction it does not seem improper to assume a different tone, and to speak freely of the principles on which I conceive that sacredness to rest. In considering the matter, however, it is important to distinguish between the real basis of this polity and the form which it assumes in the mind of the people; for these, like moral precepts and the ethical principles from which the precepts are drawn, are very different things. It is the duty of the philosopher, and in fact of every person, to reason out the grounds of his

system of morals; but, once established, the morality ceases to be a matter of intellectual speculation, and becomes in the human mind an end in itself. This is, indeed, the form which it ought to take; for like a mathematical proposition, which is first proved and then assumed without further question, a moral precept, after being proved correct, ought to be assumed and acted upon. A man or a nation that went back to first principles, in order to decide each question as it arose, would be very much in the position of an engineer who felt obliged to go through the Pythagorean proposition every time he laid a timber of a bridge. Morality is of little or no practical value until it has reached the stage of conviction; and the real intellectual and moral wealth, the working capital of men or nations, consists of the accumulation of principles which they have proved and no longer question. In this manner the sacredness of individual rights is treated in the American constitutions as something absolute and final, but to the philosopher it must be proved.

Discarding the exploded doctrine of the natural rights of man, and assuming on the contrary that the system of government which most promotes the moral and material welfare of the community is the best, let us examine

the principles of utility on which the protection of personal liberty and private right depends. The chief of these is the encouragement of individual enterprise and exertion. When De Tocqueville visited America he was struck by the fact that the people, although intolerant of eccentricity in habits, manners, and opinions, admired enterprise in commercial matters; and while the first of these peculiarities is by no means so marked as it was at that time, the second has left its stamp on the form of the government. The Americans have always believed that by individual enterprise great schemes are started and great inventions made, which increase vastly the wealth of the whole community and result in immense benefits to both rich and poor. The patent laws spring from this conviction, and they have been a most important factor in the prosperity of the country. Now, for effective development of enterprise, three things are requisite, — absence of restraint to the greatest extent that is possible; confidence on the part of the individual that he will be able to enjoy unmolested the fruits of his labor; and the possibility of calculating the result of a course of conduct so that the projector of an enterprise can foresee the consequences of his actions, and lay his plans accordingly.

The first of these requisites is evident to any one who reflects upon the subject, for it is proverbial that genius cannot work in harness, and that unless it is free to make its experiments and develop its conceptions in its own way it will never produce anything at all. A bureaucratic system where everything is regulated by the state is certain to be a stationary system; and if enterprises had to be submitted to the public authorities for approval before they were put in operation, there would soon cease to be any great enterprises at all. Nor is it the projector alone who must be free from restraint, because every scheme or invention which adds materially to the prosperity and welfare of the community involves to a greater or less extent a modification of the conduct and habits of a large number of people; and unless these are free to adapt themselves to the new conditions, the experiment will meet with obstacles at every turn, and will be brought to a standstill before it has developed headway enough to be fairly tried. It is probable that the difference between the stagnant and the progressive periods of the world's history consists less in the absence of men of genius able and willing to make discoveries, than in the reluctance of the community so to change its course of life as to obtain the benefits which a discovery

would bring within its grasp. In a flexible state of society, where people are ready to take advantage of useful innovations, thousands of eyes are all the time watching for new opportunities to make money; are trying to find something which the public wants, something which will contribute to the comfort or welfare of the community.

The second requisite I have mentioned is a confidence on the part of the individual that he will be able to enjoy unmolested the fruits of his labor. This supplies the chief stimulus to exertion; nor can the energy which produces great results be sustained by the prospect of moderate gains alone. It is not uncommon to hear the remark that some person who has made a considerable fortune by his talents has got enough, and has reaped all the profit he is fairly entitled to; but such an opinion shows an entire misapprehension of the subject. It is the fact that one man in a thousand wins an enormous prize which induces others to struggle on in neglect and poverty; and there can be no doubt that the talent of the American people for invention is due in large part to the few great fortunes which have been made under the protection of our patent laws. The prospect of large returns is necessary, moreover, to induce capital to embark in hazardous ventures, and

the great sums of money occasionally amassed are by no means too much to pay for the thought, the labor, the anxiety, and the risk involved, or for the result produced. It has been truly said that the millions which Vanderbilt made were a cheap price to pay for the railroad facilities which he gave to the city of New York; and the like may be said of Arkwright's spinning-jenny, and of many inventions in more recent times.

The third requisite for the development of individual enterprise which I have named is the possibility of calculating the result of a course of conduct so that a man can foresee the consequences of his acts, and lay his plans accordingly. The late Professor Benjamin Peirce, in a discourse on the conflict between science and religion, remarked that if God, instead of ruling the world by fixed laws, constantly interfered with the course of nature, there would be "no continuity, no possible means of predicting one event from another, no science," no useful arts. Without fixed laws of nature, man would never have emerged from the state of barbarism. If the flight of an arrow were not governed by the inflexible law of gravity, the savage would never have learned to use the bow; and if fire had not been invariably destructive, he would never have learned to control it and make it serve his purposes. If, in short, the material

world had not been governed by fixed laws, man would never have acquired that power of adapting means to ends which is the very substance of civilization. This principle applies as well to the social as to the material world, and the power to calculate upon the actions of our fellow-men is as essential to the progress of society as the ability to rely upon the constancy of natural forces. Now I have seen it suggested somewhere, I think, that amid the complicated relations of modern life, the chief means of determining the future actions of men is furnished by contract. If it were not for a general confidence that people will carry out the agreements they have made, great enterprises would be impossible, and even the most ordinary business of every day would cease. A society, indeed, which had outgrown the rigid laws of status, and yet was absolutely without contract, would be in much the same condition as a world without friction, where no movement would be possible. It is by means of contract that society has been enabled to attain its present state of industrial and commercial prosperity; and any serious weakening of the bonds of contract, or in fact any general distrust in the strength of those bonds, would not only prevent any further progress, but would soon cause the social fabric to decay. A confi-

dence that the obligation of contracts will not be violated, together with a belief in the permanence of vested rights, being a necessary condition of the ability to calculate upon the future conduct of men, is essential to the existence of individual enterprise and to the prosperity of the community.

We have so far considered the protection of personal freedom and the encouragement of individual energy only from the side of material welfare; but the moral aspect of the matter is no less important. If we compare the paternal system of government with a social organization in which the success of each man depends entirely upon his own exertions, we cannot fail to see that the latter fosters the self-reliance and sense of personal responsibility which are the main factors in developing a strong and healthy manhood, while the former has a manifest tendency to weaken these qualities, and to sap the vital energies of the nation. Paternal government derives its very name from the fact that it attempts to treat the citizens as children, and keep them forever in leading-strings; and however well suited such a system may be to an infant or backward civilization, it is utterly incapable of producing a really high development of character in the race.

The Americans do not look on these matters

from a purely dogmatic point of view. They do not believe in the inherent right of any man to bring up his children in ignorance; nor do they allow any one to suffer to the uttermost the consequences of his misfortunes. On the contrary, they fit the citizen to enter on his career by giving him an education. They furnish him in this way with the means of accomplishing as much as he can; and if he fall, they prevent his being ground down beyond hope of recovery. In this last matter they have gone in some of the States too far, no doubt; so far as to make the collection of debts uncertain. But in spite of injudicious legislation on this and some other subjects, they have not forgotten the object of encouraging personal enterprise; and their institutions as a whole are perhaps as perfectly adapted to further this object as any mere institutions can be. Of course all civilization of European origin is mainly based on the same principle; but the paternal conception of government is everywhere growing very much, for reasons described in the second of these essays, and at the present moment there is a strong tendency to substitute state control for individual exertion. There is no fear of complete socialism anywhere at present, nor would it endure if it were established; but steps in that direction have already

been taken, and they are likely to be even more rapid in the near future than they have been in the past. These all entail in some measure the evils of socialism, for they hamper personal energy and encourage people to look to the government for aid, and thus enfeeble the spirit of self-reliance and the sense of responsibility which are the source of all prosperity and all moral worth. The state regulation of labor and wealth proposed by the socialists would, in fact, be far more discouraging to enterprise than the turbulence and oppression of the democracy of Athens in the days of her decline. The late Professor Bluntschli showed his keen appreciation of the real nature of the aspirations of these men when he said that their Utopia was a world reduced to the condition of a universal house of correction at hard labor. There being in such a state of society no reward for energy, each person would do the smallest amount of work that would satisfy the public authorities; and the socialist writers themselves really admit the truth of this fact by allowing to the workman, in all their more recent schemes, a certain amount of private property to be earned by his own efforts.

In considering this subject it is important to distinguish between voluntary and forced co-operation. The former is no discouragement

to enterprise, but, on the contrary, a striking manifestation of it, and an admirable thing so far as it succeeds. Enterprise has indeed been immensely helped in the United States by that class of coöperation which takes the form of corporations.[1] But any universal co-operation must remain an impossibility so long as men are actuated in great part by selfish motives. Society is a collection of human beings, and its structure must be based on human nature. All attempts, therefore, to frame an ideal commonwealth which do not take account of the faults and frailties of mankind are doomed to be failures. The growth in the community of an inductive tone of mind which studies actual facts will, it may be hoped, bring in time more light to bear on social problems; but in the mean while we are exposed to experiments in legislation which may do incalculable injury, and any nation may well congratulate itself whose institutions hinder in some degree movements of this character. When mankind has become perfect, and we are all stirred by single, high, and generous aims, then the system which the socialist yearns for will be possible. Then the millennium will

[1] Some of the more gigantic of these bodies have used their power oppressively, and this is unfortunately a danger which is inseparable from all coöperation on a very large scale.

come, when there will be no more private property and all men will work together for the common good. Then the whole creation will live in peace, and men will cease to kill animals for food; but universal unselfishness is as remote as vegetarianism, and as yet there are no signs of the advent of either. Socialism, to be tolerable, must at least eliminate selfishness from the rulers of the state. Better a socialism administered by an intelligent autocrat, who has no personal interest in the regulations he decrees, than one conducted by an unbridled democracy. Far better a Bismarck than a Jacobin Convention.

We are placed to-day between individualism and paternal government, which deals with men as rigid masses; and to accept the latter would be a step backward from contract toward status, not an advance in the direction which the world has followed hitherto. Respect for the individual man is one of the chief differences between modern Europe and the ancient world, between the progressive West and the stagnant East. Sympathy with individual suffering, and a conviction of the importance of the individual soul, are the mainsprings of our civilization. They are the very essence of Christianity.

I.

CABINET RESPONSIBILITY AND THE CONSTITUTION.

"He that goeth about to persuade a multitude, that they are not so well governed as they ought to be, shall never want attentive and favorable hearers; because they know the manifold defects whereunto every kind of regiment is subject, but the secret lets and difficulties, which in public proceedings are innumerable and inevitable, they have not ordinarily the judgment to consider. And because such as openly reprove supposed disorders of state are taken for principal friends to the common benefit of all, and for men that carry singular freedom of mind; under this fair and plausible colour whatsoever they utter passeth for good and current. . . . Whereas on the other side, if we maintain things that are established, we have not only to strive with a number of heavy prejudices deeply rooted in the hearts of men, who think that herein we serve the time, . . . but also to hear such exceptions as minds so averted beforehand usually take against that which they are loth should be poured into them." — HOOKER'S *Ecclesiastical Polity*, book i., chap. i.

IT is only a few years since the people of this country and of England each assumed as an axiom that their own form of government was the most perfect that human ingenuity could devise; while the political writers of each nation received the same doctrine very much like a proposition in geometry, — a thing to be

proved, it is true, but a matter of which there could be no doubt, and which needed only a formal demonstration to be readily accepted by every one. All this is so recent that it is not a little surprising, to-day, to hear criticisms upon the form of their own governments by natives of most of the free countries of Europe and America. The sign is encouraging, because the complaints do not come from persons who wish to change the basis of political power, making it more or less popular, but arise from a conviction that the government in its actual form does not work as well as it should. The most common grievance is that the legislature is unable to accomplish the work it ought to do. We hear suggestions from England that the rules of the houses of Parliament might be changed to advantage; from France and from Canada, that the system of a responsible ministry is the cause of most of their misfortunes; while for this country the same system of a responsible ministry is recommended as a panacea for all our ills. Now government by a responsible ministry has many unquestionable advantages. It has a great tendency to interest and instruct the people; it conduces to a thorough public discussion of proposed legislation; it turns a flood of light upon every corner of the administration; and if the

object of government is to divide the people into two political parties, and to give rapid and unlimited effect to the opinions of the majority, no better political system has ever, perhaps, been suggested, — provided that the people themselves have no deep-rooted prejudices, founded on religion, on race, or on historical association, to impede their progress.

But in the United States the object of government is looked upon in a very different light from this. It is here considered of the first importance to protect the individual, to prevent the majority from oppressing the minority, and, except within certain definite limits, to give effect to the wishes of the people only after such solemn formalities have been complied with as to make it clear that the popular feeling is not caused by temporary excitement, but is the result of a mature and lasting opinion. This is done, in the words of the Constitution of Massachusetts, "to the end it may be a government of laws, and not of men," or, as we should put it to-day, a government by principles, and not by popular impulse. The result is a complicated and unwieldy form of government; a division of powers into legislative, executive, and judicial; a subdivision of the legislative power between two houses and a president or governor; and in most of the States a distri-

bution of the executive power among a large number of officers who are virtually independent of each other. These divisions of power are accompanied by cross-divisions separating the powers given to the federal government from those reserved to the several States; but the feature of the American system which shows in the most striking manner the attachment of our people to the fundamental principles of law is to be found in the power of the courts to disregard an act of the legislature when it violates those rights which have been protected by the Constitution. The notion that legislative power could never infringe private rights was, indeed, carried so far at one time that certain judges assumed an authority to hold a statute invalid if it was repugnant to the common principles of justice and civil liberty, even if it did not conflict with any express provision of the Constitution.[1] It is needless to say that such a doctrine is not law, but the fact that it could be proclaimed from the bench is significant as an indication of popular feeling.

It is not my intention, in this essay, to discuss the relative merits of the English and American forms of government, but merely to attempt to show that a responsible ministry cannot be grafted into our institutions without

[1] See page 169.

entirely changing their nature, and destroying those features of our government which we have been in the habit of contemplating with the greatest pride.

The essential characteristic of a parliamentary government consists in the fact that the cabinet — a body comprising all those members of the executive department on whom the policy of the administration depends — can remain in office only so long as it receives the support of the legislature. The members of the cabinet have seats in the legislature, and they are expected to superintend its work, and to prepare such bills as they think ought to be enacted. But it is not for the performance of these duties alone that they are responsible. They are liable to be turned out of office if the legislature disapprove of their conduct in matters purely administrative. Mr. Gladstone's cabinet, for example, was no less responsible to the House of Commons for sending Lord Wolseley up the Nile than it was for proposing an increase of the tax on beer, and a vote censuring its policy in the Soudan campaign would have caused its resignation no less certainly than a defeat on the budget. The legislature is made familiar with the policy of the ministry in legislative matters by the bills it introduces, but it can also obtain as much information

about matters of administration as it desires by means of questions addressed to the ministers. It is evident, therefore, that the supervision which the legislature exercises over the details of administration is limited only by the temper of the legislature itself, or, in fact, by the intelligence, energy, and strength of the opposition. The legislature has complete power of control over all matters, both legislative and executive, but so long as the cabinet retains the support of the legislature, all the powers of government are virtually entrusted to its care. In the words of Bagehot, the cabinet "is a board of control chosen by the legislature, out of persons whom it trusts and knows, to rule the nation;" and this, in the opinion of John Stuart Mill, is the most perfect form of government.

Let us suppose such a system to be introduced into the United States, and let us try to discover what effect it would produce upon our institutions. I shall, however, confine the inquiry to the federal government, for the results in the States would be the same.

The first matter to be considered is the position the President would occupy if an amendment to the Constitution were to provide that the executive officers should be responsible to Congress; and let us suppose, to begin with, that the President himself is given a seat in

one of the houses. If, in such a case, the President were a man of sufficient ability and force of character, he might become the leader of Congress, and he would then occupy a position essentially the same as that of the premier in England. He would be his own prime minister. This was the situation of M. Thiers when President of the French Republic, for he refused to allow his advisers to become a ministry in the parliamentary sense, and held himself personally responsible for the acts of his government. But no matter how great a leader the President might be, such a state of things could last only so long as Congress continued to be of his own party. The moment a Congress of the opposite party was elected, he would be obliged either to resign, or to give up all exercise of power, and surrender the government into the hands of some one who could obtain the support of Congress; because, by the very definition of a responsible ministry, no one can continue at the head of the administration whose policy has been condemned by the legislature. Experience shows us how rarely it would happen that a President elected by the people would be capable of leading Congress. If he were not able to do this, the real leader of Congress and head of the government would be some other member of the administration;

and in that case the President would have no more actual power than if he had no seat in Congress, and were not a part of the ministry at all.

But, in fact, no one proposes that the President shall be a responsible prime minister, or have a seat in Congress. The advocates of a parliamentary government go no further than to suggest that the advisers of the President shall sit in Congress, and that they alone shall be responsible to it for their actions. Under such a system the President would remain in office for the four years of his term in any event, while the cabinet officers would retain their places only so long as Congress was willing to allow them to do so. The President would then be obliged to select his cabinet from among the leaders of Congress, for otherwise the administration would be without strength, and in danger of being upset whenever the men who really commanded Congress should conclude that they wanted cabinet positions for themselves. But it is evident that cabinet officers, who knew that they could not be dismissed without the consent of Congress, and who were at the same time the leaders of Congress and able to control its actions, would find it very easy to carry out their own policy of administration without much regard to the

wishes of the President. They would be called upon, moreover, to explain and defend before Congress the policy of the government, and they could not do this unless that policy were really their own. They would make but a sorry piece of work in defending the acts of the President unless they really approved of those acts, and were willing to assume complete responsibility for them. They clearly could not shield themselves by pleading the orders of the President, because his orders would not be binding on Congress, and such a defence would not prevent Congress from turning the cabinet out, and insisting on a ministry which would fulfill its wishes. Of course the responsibility of the cabinet to Congress would not make the President a figurehead at once. George III. exercised an immense influence over the House of Commons long after the principle of a responsible ministry had become a part of the British Constitution, and in a less degree we should see the same thing here. The tradition of the President's authority would probably enable him to influence politics for a long time; but as Congress became more and more conscious of its power, it would control more and more completely the acts of the administration. It would gradually force the cabinet officers to be strictly responsible to itself, and it would

finally concentrate all powers, both legislative and executive, in its own hands. So long as Congress and the President were of the same political party the process would probably go on slowly; but it is clear that if a Congress of a party hostile to the President were elected, he would rapidly lose all control of the administration, which would pass into the hands of his political opponents. Mr. Bagehot, while discussing the separation of the legislative and executive powers in this country, and the exclusion of our cabinet officers from seats in Congress, remarks, "And, to the effectual maintenance of such a separation, the exclusion of the President's ministers from the legislature is essential. If they are not excluded they become the executive; they eclipse the President himself. A legislative chamber is greedy and covetous; it acquires as much, it concedes as little as possible. The passions of its members are its rulers; the law-making faculty, the most comprehensive of the imperial faculties, is its instrument; it will *take* the administration, if it can take it. Tried by their own aims, the founders of the United States were wise in excluding the ministers from Congress." In those countries in which a parliamentary government has been introduced, the nominal head of the administration, whether hereditary as in

England, or elected as in France, has gradually lost his political power, and this must, in the nature of things, always take place. Germany may seem to present a striking exception to this rule, but there the cabinet is not in fact responsible, for by means of the vast personal force of Prince Bismarck the emperor has been enabled to keep a strong hold on the reins of government; but no one can suppose that Bismarck himself would have been able to treat the Congress of the United States as he has treated the German Reichstag, and even in Germany he has done no more than put off the day he so much dreads, because it will not be possible for his successors to follow in his footsteps in this matter.

After considering the position the President would occupy if we had a responsible ministry, one is naturally led to inquire what changes such a system of government would produce upon Congress. That body is now composed of two branches, each of which has not only a constitutional right to refuse to enact laws proposed by the other, but has no hesitation in actually exercising its authority. Mr. Bagehot, a strong advocate of parliamentary government, considers such a state of things exceedingly pernicious; while, on the other hand, the publicists of the last century, and most Americans at the present

day assert that it is very important, if not absolutely necessary, as a check upon popular impulse. Let us consider whether the existence of two really independent houses of Congress is possible in a parliamentary government. The cabinet is to be responsible. Responsible to whom? To the two houses of Congress. This is all very well so long as the houses are of one mind; but what will happen when they disagree? Suppose that the House of Representatives should continue to support the cabinet while the Senate opposed it, and that the cabinet refused to resign. The Senate would then have but two courses open to it: either to hamper the policy of the administration in every possible way, and attempt to force the hands of the cabinet and the House, or to submit; and if it should submit, it would fall in prestige, and gradually lose all voice in the control of the administration. When, in such a case, the majorities of the House of Representatives and of the Senate do not belong to radically different parties, a compromise may be arranged, it is true: but if this arrangement is really a compromise, and not a virtual surrender on the part of one of the houses, the cabinet will be weak and its policy negative; or if it happens that the cabinet is vigorous and composed of able men, it will play off each of

the houses against the other, and be in reality responsible to neither of them. A ministry cannot be responsible to two chambers. In the long run it must depend upon the support of the stronger one alone, and disregard the action of the weaker. And this becomes more clear when we consider that one of the most important duties of a responsible ministry is to explain and defend its policy in the chambers, because the ministry cannot really fight its battles in both chambers, for the debates that take place in one cannot be repeated in the other, nor will a part of the debates take place in one and a part in the other. All the important discussions will tend to occur in the chamber which shows the most power, and the chamber in which the debates take place will have the most attraction for men of talent and ambition; and so the stronger chamber will grow stronger, and the weaker will become weaker, until all authority is centred in the former. Mr. Bagehot's description of the position of the House of Lords must in time apply to the second chamber in any country where the more powerful chamber is not so torn by factions as to be unable to maintain a definite policy of its own. "Since the Reform Act," he says, "the House of Lords has become a revising and suspending House. It can alter Bills; it can reject

Bills on which the House of Commons is not yet thoroughly in earnest — upon which the nation is not yet determined. Their veto is a sort of hypothetical veto."

The French Senate appears to be an exception to this rule, for it has a very considerable amount of power, and at times it has not been afraid to defeat the policy of the Chamber of Deputies. The most extraordinary example of this occurred in 1883, when the premier, M. Duclerk, resigned because he could not approve of a bill for the expulsion of the Orleans Princes, which was supported by a majority of the committee of the Chamber of Deputies and by most of the members of his own cabinet. M. Fallières formed a ministry, and the bill was immediately passed by the Chamber of Deputies; two weeks later it was defeated in the Senate, and M. Fallières resigned. M. Ferry succeeded him, and managed to deprive the Princes of their commands in the army under the provisions of an existing statute; but the Chamber of Deputies made no attempt at that time to insist upon its policy of expulsion. Thus within three weeks two cabinets were wrecked by the same bill: the first by the Chamber of Deputies which supported the bill, and the second by the Senate which refused to pass it. Now this was possible only because

the majority of the Chamber of Deputies, although agreed upon the bill in question, was not sufficiently united to be really in earnest in the support of the ministry. The French Chamber is, in fact, so split up into factions that a compact majority is impossible, and a committee system unsuited to a parliamentary government tends to increase the difficulty, until every ministry is the result of a sort of coalition. The Chamber tolerates, but never supports, the ministers; and this is the cause not only of the weakness of the ministries and their uncertain hold of office, but also of the power which the Senate has been able to retain.[1]

In a parliamentary government the power of dissolving the legislature is almost essential to the smooth working of the system, because a minister who feels that the people are on his side when he loses the support of the house cannot be made amenable to the latter. The ministry looks to the house for support, but in order that the system may work well they must both feel that their policy is in harmony with the will of their constituents, because these are the final judges of the policy of the government, and an election, whether it takes place upon a

[1] Since this essay was written the Senate has steadily lost power, until, by failing to take a decided stand of any kind at the time of President Grévy's fall, it committed political suicide.

sudden dissolution or at the expiration of a fixed time, is an appeal to their judgment. From this point of view it is evident which of the two branches of Congress would overshadow the other and become the centre of power. Every two years, according to the Constitution, the entire House of Representatives is elected, and there assembles at Washington a new House in sympathy with the opinions of the people: if, therefore, we had a responsible ministry, the people, in electing the House, would pass judgment biennially upon the acts of the ministry. But only one third of the Senate is renewed within the same period, so that this body is never a very accurate index of the opinions of its constituents. A reëlection of a third of the Senators could hardly be looked upon as a verdict upon the acts of a responsible ministry; and even if the Cabinet were given power to dissolve entirely both branches of Congress, the two houses would not stand upon an equality, because the election of the House of Representatives would indicate the opinion of the people, while the new Senate would represent only the States; and there can be no question that the will of the people, and not that of the States, would be the decisive matter. The Senate represents the people indirectly; but while the House represents their

present wishes, the Senate may be said to represent their more deep-rooted and lasting opinions. It is partly to this quality that the Senate owes its power and its usefulness; but in a parliamentary government an appeal to the people means an appeal to the present opinion of the people, for it can mean nothing else. The elections to the House of Representatives would be the answer to this appeal, and it is the House which would be clothed with the power of the people.

I shall now boldly assume that the reader is convinced of the truth of all that has been said, and I shall lay it down as a foundation for further discussion that, if a responsible ministry were introduced into our government, the House of Representatives would acquire the powers of the House of Commons; that the Senate would occupy a position similar to that of the House of Lords; and that the President would be reduced to such a condition that, except for the absence of a pedigree and of crown jewels, he might well be degraded to the condition of a king. I wish now to inquire what effect such a state of things would have upon the relations of the state and federal authorities. In discussing the government of the United States, Mr. Bagehot remarks: "After saying that the division of the legislative and executive in

presidential governments weakens the legislative power, it may seem a contradiction to say that it also weakens the executive power. But it is not a contradiction. The division weakens the whole aggregate force of government, — the entire imperial power; and therefore it weakens both its halves." The converse of this is also true. The union of the legislative and executive departments would increase the aggregate force of the federal government, — would increase its power to accomplish its purposes, and would enable it with much greater ease to encroach on the authority of the States if it should desire to do so. Now it is almost an axiom in political science that the powerful always hunger for more power, and that the ability of one body to encroach upon the authority of another is the father of a desire to do so. But this is not all. It is claimed by those who advocate a parliamentary government for this country that such a government would increase the interest of the people in national affairs; and this in itself is a very good thing; but it must not be forgotten that a concentration of popular interest means a concentration of popular power. If the people become excited over a federal issue beyond a certain point; if they learn to look upon it as a matter of paramount importance, they will endeavor to

give effect to their opinions with all the power that they possess, without much regard for the theoretical rights of the States. We saw an example of this at the time of the civil war. It is a proof of the strength of our Constitution that the war did not produce a far greater centralization than we have witnessed, and that the system has so nearly recovered its equilibrium; but in spite of its strength the Constitution would not stand many strains of such violence. Of course I do not mean to assert that under a responsible ministry the popular excitement would at all compare with what it was at the time of the civil war; but I do mean to say that national questions would constantly assume an importance in the eyes of the people which would entirely overshadow local interests, and that a responsible ministry, armed with the power of public opinion, would bring to bear upon the States a steady pressure which they would be unable to resist. It has been said that the United States is still in its feudal period, and to a certain extent the metaphor is appropriate; because just as the feudal barons in the Middle Ages presented points of physical resistance to the centralizing ambition of the king, so to-day the States present points of moral resistance to the centralizing tendency of our national government. They form centres

for the organization of local opinion, and rallying points for those who are in a minority on federal questions.[1]

[1] It is also to be remembered that the smaller the community which exercises political power, the larger will the individual be in proportion to that community. A member of a small community will find it comparatively easy, therefore, to assert his rights, and the community will find it difficult to trample upon them.

M. Boutmy, in comparing the governments of France, England, and the United States, imputes the absolutism of the French to the absence of great public corporations. His remarks are so much in point that I venture to quote them at some length (*Droit Constitutionnel*, page 239 *et seq.*): "En France, il n'y a pas depuis 1789 d'autre être collectif animé d'une vie puissante que la nation, conçue dans sa totalité indivisible. Au sein de la nation il n'y a de consistant que l'individu. . . . La souveraineté sera théoriquement la volonté de tous les citoyens, et pratiquement elle se confondra avec la volonté de la majorité numérique. . . . Il n'y a pas de point d'appui en dehors de la majorité, il n'y en a donc pas contre elle pour une résistance ou une dissidence qui dure. . . . On a vu qu'en France l'équation politique ne comprend que deux termes: l'individu et l'État, un infiniment petit et un infiniment grand. . . . L'égoisme chétif de chaque citoyen fait seul face à l'intérêt indivisible et supérieur de la nation. . . . Les droits de l'individu, premier thème de la constitution, source reconnue de tout pouvoir légitime, pâlissent trop souvent pendant cette seconde phase et s'effacent devant cette idéal usurpateur. L'intempérance législative et réglementaire du Parlement et des pouvoirs publics, l'existence et l'activité exagérée d'une *justice administrative* où l'État figure comme juge et partie, sont les deux faits qui accusent le plus sûrement ce penchant à subordonner et à humilier l'intérêt ou les libertés privées, et à fonder le despotisme consciencieux de l'intérêt public. L'Angleterre, et, dans la sphère fédérale, les États-Unis, ont moins souffert que nous du premier de ces maux; ils ont échappé au second.

"Ces deux pays ont dû en effet à l'importance et au prestige des grandes personnes morales qui ont précédé et créé leurs constitutions, de ne pas connaître jusqu'à présent cette antithèse heurtée de l'État et de l'individu, cette oscillation sans arrêt intermédiaire,

We have not yet considered the effect of a responsible ministry upon the most vital part of our government, the part on which the whole system hinges, and that is the authority of the courts. Their power to disregard a statute which violates the provisions of the Constitution is the barrier that preserves the limits of the different forces in the government, that prevents gradual and unobserved encroachments, and makes it possible to maintain a system of divided sovereignty. To European statesmen this power of our courts is a standing wonder, but to the American it is the obvious and natural result of a written constitution. It is, in fact, the logical consequence of a limited form of government. Suppose a legislature invested with only a limited authority. Any act outside that limit is unauthorized, *ultra vires*, as the lawyers would say, — that is, beyond the powers of the legislature, — and has no force. Every one may disregard it, for it is entirely invalid, and clearly the courts cannot give it

qui relève et fait dominer alternativement les droits de l'un et la haute mission de l'autre. Un autre problème a retenu dans une région moyenne l'attention des constituants et les a empêché de glisser sur la pente vers ces deux questions extrêmes, c'est celui d'une balance à établir entre des puissances préexistantes."

He adds later that this is ceasing to be true of England. It is only fair to say that M. Boutmy considers the absolutism of France to be a higher form of civilization than the decentralization of the United States.

any effect.[1] Inasmuch as the legislature represents the people, and, in the States at least, the very same people who establish the Constitution, it may seem strange that they should limit the power of their own representatives; but it is precisely because the people alone are the unquestioned source of all government in this country that they are willing to limit their own power. The most astonishing thing to foreign statesmen, however, is not that the people should profess to set up such limits, for this has been done in European constitutions, but that they should keep them, and allow the courts to refuse to enforce the acts of their representatives when they overstep them. In the United States, on the other hand, all this is so much a matter of every-day occurrence that we are in the habit of looking upon a constitution as possessing a sort of intrinsic strength, and maintaining itself *proprio vigore*. The illusion is beautiful, and justified in our own case by experience, for it is founded on the respect which our citizens feel for the law, and especially for those fundamental principles which are embodied in their constitutions. But in reality a constitution can retain its force only

[1] In the *Atlantic Monthly* for November, 1884, Mr. Brooks Adams has made a very interesting study of the historical development of this idea.

so long as the people care for it more than they care to effect any immediate object. Every government is bottomed on force, or, at least, its existence depends upon the consent of those who have power to change it, and in a purely democratic nation the form of government depends upon the acquiescence of the majority. When the people make up their minds that they would rather amend the Constitution than fail to effect some desired object, it becomes certain that the Constitution will be amended, and if this happens often the fate of the Constitution is sealed. The Constitution of the United States depends upon the fact that the people, with rare exceptions, care more about that Constitution than about any present issue; and the courts are supported in holding a statute unconstitutional because the people cling to the fundamental principles of law represented by the court, and care more for them than for the statute which the court holds invalid.

The reader may be inclined to admit all this, and ask how a responsible ministry affects the matter. It affects it vitally, because, as I have attempted to show, a responsible ministry involves the fusion of the legislative and executive branches of the government, and the concentration of all political power in the hands of the direct representatives of the people; and

this, accompanied by the increased excitement over national issues and the decay in the political power and importance of the States, would accustom us to seeing rapid and unlimited effect given to the opinions of the majority. The people would soon learn to chafe at the delays and obstructions of our constitutional methods, and lose the habit of restraining themselves for the sake of an ideal; while the majority would naturally consider every political issue as of paramount importance, and feel that the solution of a pressing question ought not to be endangered for the sake of any theoretical principles, or in order to preserve the forms of a paper constitution. The courts, too, would find themselves in a very different position. Instead of standing between the different branches of government among which political authority is divided, and limiting the power of one for the benefit of another, they would have the full force of government on one side, and nothing to support them on the other. At present the more important questions of constitutional law before the court usually involve the authority of the nation as against the States, or the rights of the States as against the nation, or the power of one department of the government as against another; and even when the court holds an act unconstitutional on the ground

that it violates one of those provisions which are established solely for the protection of individuals, it does not set aside the act of the people, but only the act of a body which but partially represents the people, and exercises only a very small part of the popular sovereignty. But under a parliamentary government a court which should venture to declare a statute unconstitutional would be brought face to face with the people themselves.

In a speech a few years ago, Lord Salisbury is reported to have said that he did not often envy the Americans anything, but that there was one institution which he did envy them, and which he should like to see adopted in England, and that was a court possessing power to declare a statute unconstitutional. No doubt the Tory leader would have been pleased with any institution which would check the legislation of the Liberals, but in this instance he was unfortunate, because he desired an impossibility. Apart from the fact that the central principle of the English Constitution is the omnipotence of Parliament and that the court would find no ground to build its decisions upon, no court in England could possibly have power to hold acts of Parliament invalid, because Parliament is, in effect, a meeting of the people acting through their representatives. Complete

sovereignty resides, therefore, in Parliament, and to oppose the will of that body is to oppose the will of the people. But the American Congress has not complete sovereignty, nor has any department of the government, state or federal, nor have all of them acting together. Congress has no authority to declare the will of the people, except within the limits prescribed by the Constitution; for the Constitution itself is the final expression of the popular will, and is binding upon every officer of the government as the supreme law of the land. I am not speaking of the Constitution from a legal standpoint alone. I am speaking of it as it is regarded by the people themselves; for if this view of the matter were entertained only by the lawyers, no court which assumed power to set aside an act of Congress would be tolerated for a moment. The power of our courts, then, to pass judgment upon the validity of statutes, depends upon the fact that the voice of Congress is not the voice of the people. But if a parliamentary form of government were to be introduced into this country, Congress, like the British Parliament, would acquire authority to declare the will of the people, and then no court could long withstand its power.

I have so far attempted to consider the probable consequences of making cabinet officers

responsible to Congress, and to prove that, under such a change of methods, our government would centralize, at the expense of the authority and independence of the States, and that in time the national House of Representatives would draw unlimited political power into its own hands. But a recent writer on the subject claims that, in the absence of a responsible ministry, these results have already taken place; and this essay would be incomplete without a review of the facts on which he bases his opinion.

In his book on Congressional Government[1] Mr. Wilson uses a line of argument very different from the one commonly in vogue with those who advocate a parliamentary government for this country. He says nothing inconsistent with what I have described as the probable consequences of cabinet responsibility, but, on the contrary, after the manner of Bagehot's essay on the English Constitution, he attempts to show that the actual form of our government is already radically different from the plan that our forefathers designed, and from the descriptions to be found in our political literature. He claims that the supposed checks and balances of the system have failed; that the President

[1] *Congressional Government*, by Woodrow Wilson, Boston, Houghton, Mifflin & Co., 1885.

has ceased to present an obstacle to the power of Congress; and that the States are no longer able to resist the encroachments of the federal government. Of the power of the Senate, curiously enough, he says little, although he devotes a chapter to that body; but he certainly gives the reader the impression that he considers all real power centred in the committees of the House of Representatives. All this is the more surprising because one of the complaints against Congress which we hear most commonly is that the House of Representatives has brought itself into such a condition that it is unable to legislate. Of the judiciary, after explaining that the courts do not and cannot put any effective restraint upon the actions of Congress, Mr. Wilson says: "This balance of judiciary against legislature and executive would seem, therefore, to be another of those ideal balances which are to be found in the books rather than in the rough realities of actual practice;" and later he adds, "For all practical purposes the national government is supreme over the state governments, and Congress predominant over its so-called coördinate branches. Whereas Congress at first overshadowed neither President nor federal judiciary, it now on occasion rules both with easy mastery and with a high hand." On these facts

he founds the argument that, if our theoretical division of powers has miscarried in practice, and if our government has already become centralized, it would be wise to adopt that form of centralized government which will work the best. For this reason he advocates a responsible ministry. The argument is logically sound, and the conclusion follows properly enough, if the premises are admitted; but these I cannot agree with, and I wish to consider them in the brief space which this essay will allow.

Our government has undoubtedly centralized a good deal since the beginning of the century; for the greater facility of communication between the different parts of the Union, the formation of vast corporations comprising several States in the scope of their operations, and the consequent industrial development of the country, demand from the federal government the exercise of powers which were far less important ninety years ago. There exists unquestionably a tendency to centralization, which all citizens who care for the Constitution should watch with a jealous eye; but it is a tendency very easy to exaggerate, and not yet developed to such an extent as to impair the political power and independence of the States. The war, and the reconstruction which followed, necessarily produced for a time a great increase

in the power of the national government. A part of this increase of power has been rendered permanent by the adoption of the recent amendments to the Constitution, while the decision of the Supreme Court in the legal-tender cases has assured to Congress the possession of another part; and for the rest, it is difficult to shake off habits of political thought once acquired; but for many years the federal government has been playing a constantly decreasing part in the internal affairs of the Southern States, and he must have been blind to the signs of the times who did not perceive long ago the tendency to leave to these States the management of their domestic interests. The Supreme Court, moreover, in the civil rights cases, struck a heavy blow at the paternal policy of Congress, by denying to it the right to interfere directly with the social condition of the citizens of the States, and limiting its authority to counteracting and redressing the effects of the action of the state authorities. Mr. Wilson cites as an illustration of the growth in the power of the federal government the enormous increase in the number of federal officials; and so long as offices are made a reward for party service, this standing army of placemen adds dangerously to the political power of the United States; but when we obtain the

complete reform of the civil service for which every citizen ought to hope, the mere number of federal office-holders will in itself be little or no source of power to the national government. Mr. Wilson also mentions the practice of spending federal money to make internal improvements; and undoubtedly this power of Congress, which was hotly debated fifty years ago, has now become an unquestioned part of our constitutional system. Yet, even during the administration of President Jackson, Congress, under the name of deposits, in effect gave to the States the surplus from the national treasury; and it can hardly be said that Congress has of late years done anything under the name of internal improvements which carries the doctrine of implied powers further than this. The statute which provides for the appointment of supervisors of election is cited as the most galling example of the assumption of power by the national government. But it must be remembered that the statute was intended to counteract an illegal exercise of power, — not by the States, it is true, but by persons subject to the control of the States, — and that the statute has not so much the effect of changing the original balance of power between the States and the federal government as of restoring the balance of power; for the

framers of the Constitution never contemplated any local power to tamper with the results of elections. The fact appears to be that, although the United States has largely increased its authority, the government has not become centralized to such an extent as to upset the balance of power, or even to disturb seriously the equilibrium of the system. Nor has the gain been all on one side. For a long time certain States, of which New York is a conspicuous example, chose the presidential electors by districts; but by adopting the plan of choosing them on a general ticket they have greatly consolidated their political power. It is also worthy of note that the electoral commission in 1876 decided that Congress had no power to go behind the returns of the States in counting the votes for President; whereas in 1839 the House of Representatives refused to allow certain members whose election was contested to take part in the organization of the House, although these members held the official certificates of the State governor and council declaring them elected; for the House denied that the certificate of the State gave the holder even a *primâ facie* right to a seat. The two cases are not exactly parallel, and the decisions were rendered under the pressure of party excitement; but still they go far to disprove

the statement that the political power of the States has decayed.

The relative strength of the three departments of the federal government has suffered much greater changes during the century, but it has not always been the same department that has encroached on the others. At times the power of Congress has been in the ascendant, at times that of the President; and this must continue to happen as long as Congresses differ so much in the talent and experience of their members, and as long as a weak and short-sighted President is unable to exercise as much influence as a President of ability and force of character. But Mr. Wilson is in error when he states that "Congress is supreme over its so-called coördinate branches." A sufficient proof of the continuing strength and independence of the President is to be found in the fact that to this day he has no hesitation in using his power of veto; for the veto has been used more freely of late years than at any period of our national existence. If any further evidence of the power of the President is needed, it is enough to refer to the last great struggle he has had with Congress, — the controversy between President Hayes and Congress about riders upon appropriation bills, in which the President was completely victorious. The veto

can, of course, be overridden by a two-thirds vote of both houses of Congress, and this is done as often as the majority in both houses is large enough to make it possible; but that is no encroachment on the part of Congress, for it is merely the legitimate exercise of a power which Congress was intended to possess.

Turning from the legislative to the executive functions of the President, we find that his power has undergone very great variations. When Jackson adopted the practice of giving federal offices as a reward for party service, he forged for the use of Presidents a political instrument of tremendous power; but the President has not been suffered to reap in peace the benefit of this great invention, for a practice has arisen by which the congressional delegations from the several States have acquired a great influence in the distribution of the federal patronage. This practice has grown gradually and silently; but during the attempt of Congress to tie the hands of President Johnson it passed the Tenure of Office Act, which struck an open blow not only at the power of the President to use the spoils for his own advantage, but also at his power to direct the policy of his own administration. At this time the authority of the President fell lower than it has ever been before or since; and although the Ten-

ure of Office Act still exists in a slightly modified form, it has not the political importance which it possessed in Johnson's day. The doctrine that the President has no right, under the Constitution, to remove any federal officer without the consent of the Senate, is not new. It has been a subject of dispute ever since Washington's administration, but in Johnson's time it was used to force him to retain a Cabinet officer who was bitterly opposed to his policy. It will probably be a long time before the Senate tries to do this again, and it is clear that such an attempt could not now be successful. The subject of the appointing power of the President cannot properly be dismissed without a reference to the principle of senatorial courtesy, by which each Senator of the President's political party controlled an important part of the federal patronage in his own State, because the contest between President Garfield and Senator Conkling on this matter is one indication of the recovery by the President of his lost influence. Mr. Wilson's views in regard to the position of the President are explained by a passage in which he says: "No one, I take it for granted, is disposed to disallow the principle that the representatives of the people are the proper ultimate authority in all matters of government, and that administration is merely the

clerical part of government." The first proposition contained in this sentence is true in a parliamentary government, but the second is not true in any form of government; and that it cannot be applied to our President, even if we pass over the veto and the power to control foreign relations, is clear when we remember how large a part the executive played in the final settlement of the Southern question. The importance of the executive in the solution of that question was not exceptional. It has long been evident, for example, that Congress can do very little towards the reform of the civil service without a zealous coöperation on the part of the President. A stranger, indeed, who knew nothing of America except what he could hear during a presidential campaign, would readily believe that the President held the only federal office of any real importance. This results in part from the habit of making the candidate for that office the standard-bearer in the fight, but it comes also from the fact that the President not only wields the executive power, but has also a decided control over legislation.[1]

It is only necessary to look at the volumes of the Supreme Court reports to be convinced

[1] The power displayed by President Cleveland affords a striking confirmation of the views here expressed.

that the judiciary has not lost its independence or its power. The decisions in the civil rights cases,[1] in the Arlington Heights case,[2] and in the case which decides that the House of Representatives has no power to examine a witness and to commit him for contempt on a matter not strictly connected with its legislative duties,[3] all prove that the judiciary has not become subservient to the other departments of the government. In spite of the well-known charge that the bench was packed under President Grant, and of the unfortunate connection of the judges with the electoral commission, the Supreme Court appears to stand at the present day as high in public estimation as ever. I might with truth go further, and say that the concentration of power caused by the civil war has turned in the long run mainly to the profit of the national courts. The recent amendments to the Constitution have increased but little the powers of the President and of Congress, but they have added enormously to the authority of the federal judiciary.

Among the recent historical studies published at Johns Hopkins University is a valuable essay, by Mr. Horace Davis, on the "Relations of

[1] 109 U. S. 3.
[2] United States *v.* Lee, 106 U. S. 196.
[3] Kilbourn *v.* Thompson, 103 U. S. 168.

the Departments as adjusted by a Century," and the conclusions of the author are singularly contradictory to those of Mr. Wilson. He shows that in the States the executive has been continually gaining at the expense of the legislature, and he considers that the President is recovering the power which he lost during Johnson's administration, while he believes that the judiciary, both state and federal, has steadily increased in power and influence. Slight variations in the relative strength of the different departments of the government do not affect my argument, so long as the balance of the system remains substantially unimpaired. It is enough that the power of the federal government is still limited by the rights of the States; and that the houses of Congress, the President, and the federal judiciary can each check any serious encroachments on the part of the others.

I have not attempted in this article to consider the question whether a parliamentary system would be better for us than our present Constitution, much less to discuss the relative merits of these two forms of government in the abstract. In fact, the time has passed when every good American believed that all foreign nations were more or less benighted because they did not adopt our Constitution. For my-

self, I believe that our own system is still the best for us; although, apart from those abuses which have no necessary connection with our form of government, no one can shut his eyes to the defects inherent in the system itself. The American does not accept the maxim that eternal vigilance is the price of liberty. He has altogether too much tendency to believe that liberty and good government can be bought with a written constitution; and that, once possessed, these blessings form part of that property of which he cannot be deprived, except by due process of law. In consequence of the division of political power into so many small fragments, the ordinary citizen does not take interest enough in any one of them, and leaves the control of public affairs too exclusively in the hands of the professional politicians. Whether these defects are greater than those which we ought to expect under a parliamentary government I do not here pretend to inquire. I have only endeavored to prove that a responsible ministry cannot form a part of our present system; that one or the other of these forms of government must be accepted in its completeness, with all its merits and with all its faults.[1]

[1] In dealing with this subject it would be very interesting, if time and space permitted, to carry the investigation much farther,

and to examine in detail each of the different parliamentary governments of the world. Such an examination would be especially important in the case of several of the British colonies, in order to explain the apparent vitality of the two houses in Australia, and the existence of a federal system in Canada, in the face of a responsible ministry. Any one who is thoroughly familiar with the history and the political condition of the colonies will easily perceive the causes of these phenomena, and will recognize that they are not in reality inconsistent with the views expressed in this essay.

The government of Canada is not federal in at all the same sense as that of the United States, and it is highly probable that, if her population were as homogeneous and her interests as harmonious as ours, she would have entered on a course of rapid centralization. At all events it is clear that the lack of sympathy between her different races, and the fact that some of her provinces are more naturally drawn into commercial relations with the neighboring republic than with one another, are quite enough to account for any amount of independence on the part of her local legislatures. In regard to Australia, on the other hand, it must be clear to every observer that the connection with the mother country has exercised a great though silent influence upon all the conflicts between the two houses, and it is easy to believe that if these colonies had been entirely independent the popular chamber would in each case have made short work with its less democratic rival.

II.

DEMOCRACY AND THE CONSTITUTION.

As *private Liberty* cannot be deem'd secure under a Government, wherein *Law*, the proper and sole Security of it, is dependent on *Will*, so *publick Liberty* must be in Danger, whenever a *free Constitution*, the proper and sole Security of it, is dependent on *Will*; and *a free Constitution*, like ours, is dependent ou *Will*, whenever the *Will of one Estate* can direct the conduct of *all Three*.

BOLINGBROKE, *Dissertation on Parties*, Letter XVIII.

THE founders of the American government derived their political ideas largely from the writings of Frenchmen, but they owed their political experience and their legal views to English sources, and it is partly for this reason that the public law of the United States is based upon two independent if not inconsistent principles. They are, democracy, and the sacredness of private rights. Of these, the former has until recently occupied almost exclusively the attention of foreign observers, for it is aggressive and demonstrative, making itself known by exciting elections and noisy debates in public assemblies; while the latter works silently by means of the courts of law,

although none the less powerful because less noticed. A thorough grasp of the relations which these two principles bear to each other, and of the manner in which they are combined by our various constitutions, is necessary in order that the real working of American institutions may be understood.

Ever since the Renaissance stirred men to speculate upon government, two theories concerning the nature of political power have made themselves prominent: the first dwelling upon the absolute authority of the sovereign, and declaring that no rights can exist in opposition to his will; the other insisting upon certain natural rights of individuals which the sovereign can never legally infringe. To these theories there correspond two opposite views of the proper functions of the state. According to one of them, — commonly called the paternal theory of government, — it is the duty of the sovereign to provide directly for the well-being of his subjects; while according to the other view the ruler ought to confine himself mainly to the restraint of violence, the administration of justice, and defense against foreign enemies, leaving to the citizen the task of seeking his own prosperity and happiness in his own way. But it is very important to observe that neither the paternal system, nor the system of

individual liberty, has any necessary connection with a particular form of government, and it is to the failure to recognize this fact that a great deal of confusion in political thought is to be attributed. So universal has been the conviction that an increase in popular power implied an increase in personal freedom, that the same term is still used to designate both, the word "liberty" being applied indifferently to the possession of political power, or political liberty, and to personal freedom, or civil liberty. The hold which this error has obtained even over men of independent thought is strikingly illustrated in Buckle's "History of Civilization;" for, recent as that work is, the author assumes throughout that the progress of democracy is inseparably connected with that diminution of restraint upon personal freedom in which he believes civilization to consist.

The cause of such a confusion of ideas is to be found chiefly in a reaction against the paternal despotisms that long ruled continental Europe, and in the fact that the earliest efforts of democracy were devoted to the destruction of privilege, which was at that time the great barrier to individual freedom. But there is another reason for the association of democracy with personal liberty which is extremely suggestive. Freedom from restraint and op-

pression, the right of every man to do what he pleases, is always claimed by those who are out of power, and who feel that they are in the hand of their enemies. Toleration is always an article of faith with a persecuted sect, but unfortunately it is only too rarely that this tenet is remembered when the sect succeeds in getting control of the state. Now democracy, like all other principles in the world, was an outlaw in its infancy, and many of its most ardent advocates, looking upon themselves as oppressed by the rulers of the Old World, were naturally of opinion that the activity of government ought to be reduced to the smallest possible limit. But the fact that this doctrine has no necessary connection with democracy is clearly seen in the history of France, in which the habits of centralization and state tutelage formed under the monarchy were rather increased than diminished by the revolution, and have survived every subsequent change in the form of the government.

It was formerly believed that all violations of private rights, and all interference with personal liberty, proceeded from rapacity or lust for power on the part of the monarch or ruling aristocracy, but experience has shown that this is a mistake. Even if selfish motives could be quite eliminated, and if the persons who govern,

whether king, aristocracy, or popular party, were free from any temptation to use their power for private advantage, the danger of excessive meddling with individual freedom would not be put aside; for it is a matter of every-day experience that no one is more intolerant, or more eager to force the whole world to walk in his own path, than the genuine, whole-souled philanthropist. It must never be forgotten that liberty means liberty to do wrong as well as to do right; and any ruler must be well-nigh superhuman who can look on calmly while a part of his subjects pursue a course of conduct which he considers injurious to the community, and, possessing the power to prevent such conduct, refrains from making use of it. A ruler of this kind would be regarded by most people as grossly derelict in his duty; and if in a democracy the majority of the voters considered the acts in question harmful or wicked, the government would speedily be replaced by another which would put a stop to them. Every government, in such cases, is certain to make use sooner or later of the power at its command, because the number of people who are really convinced that it is better to permit wrong than to interfere with personal liberty is extremely small.

I have said that this would be true even if

selfish motives could be eliminated, but the supposition is impossible. Rousseau, indeed, tried to prove that the interest of the individual could never conflict with that of the majority, and he went so far as to declare that no community in which political parties exist is capable of a free expression of public opinion. The same ideas prevailed even among men who did not indulge in these sophisms, for it was the general habit in the last century to speak of the people as a whole, without inquiring whether the aims of all parts of the community were of necessity identical; and it is probable that nothing which has occurred would have surprised the democrats of that time more than the immense development of party in free countries. But to-day it is perfectly clear that the interests of all parts of society do not invariably coincide; or rather it is clear that all classes of citizens do not believe that their interests are alike, and this for our present purpose is the same thing, because a popular majority, which is convinced that its welfare demands a sacrifice of the rights of a certain class in society, is under a strong temptation to trample upon them, just as a monarch or an aristocracy would be. No possessor of power, whether his impulses are philanthropic or mercenary, is ever gratified

by restraints imposed upon his use of it, and there is a great truth condensed into the short German couplet: —

> "Und der König absolut,
> Wenn er unsern Willen thut."

It is clear that where absolute power is vested in any man or body of men, the rights of individuals depend upon the will of that man or body; and this is no more true in the case of a king than in that of a legislative assembly or a sovereign people. Now we have seen that these are all constantly tempted to abuse their power both from selfish and from noble motives. If, indeed, we compare the position of a monarch with that of a popular majority, we shall find that the former has the greater reason to curb the exercise of his will, and that his tyranny is therefore likely to be the less absolute of the two. He is always very much restrained by public opinion as well as by fear of actual resistance, whereas a popular majority, or a representative assembly possessed of absolute power, being itself the organ of public opinion, has little except the votes of its own members to reckon with; and the fear of an insurrection on the part of the oppressed minority, such as De Tocqueville expected, does not appear to have exerted a restraining influence, to an appreciable extent, in modern times.

Wealth, when threatened with hostile legislation, has shown a tendency to resort to corruption, but the fear of this never cools the zeal of the law-maker, and corruption is probably the worst evil that can attack the body politic. A multitude, moreover, is less steadied by a sense of responsibility than a single autocrat. Nor is the influence of its advisers of a better character, for it has become almost proverbial that the demagogue is made of the same stuff as the courtier. His flattery, and his willingness to surrender his own convictions to the wishes of his master, are the same; and although the open rivalry of opposing parties in modern popular government gives an opportunity for criticism upon the management of affairs which does not exist under an absolute monarchy, it furnishes also a means of openly tempting the sovereign people to change its ministers by offers of fresh benefits to be derived from the spoliation of individuals. There are, no doubt, certain very striking differences between the despotism of a popular majority and that of former monarchies. Modern democracies do not inflict punishments for heresy in political or religious matters, but this is chiefly because orthodoxy is not considered of the same importance to the public as formerly, and because we have learned that persecution is rarely

an effective method of producing uniformity of creed. There is also a great diminution in the use of violence, but this is due not so much to any greater respect for liberty in democracies as to the growing abhorrence of bloodshed, and to the fact that the opposition do not and cannot resort to revolutionary methods to the same extent as under other forms of government. It is due still more, perhaps, to an appreciation of the immense superiority of legislation as a weapon for carrying into effect the will of the party in power.

The paternal theory of government has of late years been gaining ground rapidly in all countries, and especially in England, which has always been regarded as the very home of personal freedom. The habit now so common in England and her dependencies, of measuring the efficiency of a government by the quantity of statutes it has produced, is a significant symptom of this tendency; for it must be remembered that a large proportion of these acts are neither more nor less than a regulation by the state of dealings between private persons, and that in many cases they involve an actual violation of vested rights. There is a saying often quoted, to the effect that the chief task of law-makers to-day consists in undoing the work of their predecessors; but if so, one

might expect that a sympathy with their successors would induce them to pause and reflect upon the vast legislative labors which their activity is piling up for posterity.

This subject has of late years attracted the attention of several writers, of whom Mr. Herbert Spencer is by far the best known. In his collection of essays entitled "The Man versus the State," Mr. Spencer reviews the recent English legislation and shows very forcibly its paternal character, but unfortunately his discussion of the cause of such a state of things is by no means equally satisfactory. The fact is that he is blinded by a theory. He attempts to apply the principle of evolution rigidly to the history of mankind, and to prove that civilization proceeds by stages as invariable and as clearly marked as those revealed in the physical life of plants and animals. With this view he divides the progress of society into an earlier or militant stage, in which, for the sake of supremacy in war, liberty of action is denied to the individual, even the most ordinary affairs of life being regulated by a discipline like that of an army; and into a later or industrial stage, in which the state confines itself to the preservation of order and the administration of justice, leaving all other matters to the discretion of the citizen. In accord-

ance with this theory he explains the paternal tendency of British legislation by saying that England is unfortunately relapsing into the militant stage of civilization, — an idea which cannot fail to amaze any one familiar with the recent foreign policy of that country. But strange as the suggestion that the British lion is recovering a dangerous amount of pugnacity may appear, it is no less astonishing to hear a man of science complaining of that animal for trying to change the unalterable course of nature. If it is true that the industrial follows the militant stage as certainly as the evening follows the morning, and if to reverse this order is as impossible as to cause the shadow on the sun-dial to return ten degrees backward, then any indignation or alarm at the course pursued by English legislators must be quite out of place. As well might the German professor, who proved to his own satisfaction that the monkey is physically incapable of throwing a stone, get angry with the brute for showing signs of an intention to try it.

However alarming the drift towards paternal government may be, it ought not to surprise any one who has studied the course of thought during the last hundred years. At the time of the French Revolution, and to some extent on the occasion of every great demo-

cratic victory won in later years, a belief has prevailed that, by means of artificial social arrangements, mankind had been robbed of inestimable blessings which it would otherwise possess, and that to secure the complete happiness and prosperity of the people nothing was necessary but to break the chains of despotism and set the world free; but after the old order of things had been upset, and history had begun afresh, it was found that mankind had not attained the state of perfect happiness which had been foretold,[1] and which it never will reach so long as sin, folly, and weakness are such large elements in its composition. Finding that the mere destruction of existing institutions and the advent of democracy had not produced all that was expected of them, and still believing the millennium within their grasp, men naturally began to make use of the power of legislation which lay at their disposal, in hopes of improving the condition of society. The first step in this direction was philanthropic, and consisted of an unselfish endeavor to alleviate suffering and prevent wrong. To this class of efforts belong the liquor laws, and all other attempts to make men good against their will; but far-reaching and grave as legislation of this

[1] This idea is forcibly presented in Mr. Stimson's article on "The Ethics of Democracy," *Scribner's Magazine*, June, 1887.

sort may be, it is by no means the most radical that is to be expected. The next step is a great deal more momentous. The majority of the people are little favored with the blessings that flow from wealth, and perceiving that wealth depends upon law, and that the power of making laws is within their own control, they are strongly tempted to make use of that power in order to acquire for themselves a part of the benefits of property. This is the most serious form that paternal government can assume, and it is unfortunately in this form that it is spreading rapidly to-day. To any one, therefore, who reflects upon the socialistic laws already enacted, and who sees with dread the vast quantity of such legislation which is demanded, it is vitally important to examine the various political institutions in democratic countries, and to inquire how far they are adapted to promote or to check this tendency.

It is very easy to overestimate the effect of political institutions upon the development and prosperity of a community, for unless they are closely fitted to the condition of the people they are certain to be broken or twisted quite out of shape by the forces which they are designed to control. An instance of the tendency to fall into this mistake is to be found in the remark sometimes made by foreign observers that the

one question which the Americans failed to settle clearly in the Constitution — the question, that is, of the right of a State to secede from the Union — became the cause of a terrible civil war. Now any one who is thoroughly familiar with the history of the United States will recognize the fact that no provision on the subject of secession, however clear, could have averted the struggle between the North and the South. It might have changed the legal and political aspect of the quarrel. It might have postponed the war, or even altered the proportions of the opposing forces; but it could not have caused two different social systems to live side by side in peace. It is only by adapting an institution to the temperament and habits of thought of the community that it can be made to work successfully; and the failure to understand this principle, combined with the difficulty of applying it in practice, is no doubt the chief cause both of those catastrophes which have brought artificial constitutions into disrepute, and of the comparative stability of all forms of government which have resulted from a slow process of development. The Supreme Court of the United States, for example, could never have acquired its power of deciding a statute unconstitutional in any other country, at least in any other than an Anglo-Saxon country,

and this would be true even if the Constitution had been copied word for word. A stranger who knew nothing of the actual working of the American government might very well study that instrument from beginning to end without ever suspecting that the court possessed any such power at all. Institutions well adapted to the temper of the nation have, however, an important effect in directing and moderating political forces, and they exert a still greater influence by moulding the opinions and habits of thought of the people.

Taking, then, democracy as our base of operations, and assuming that the will of the majority when legally expressed is in all matters to be considered law, let us inquire what institutions are appropriate to a paternal government, and what contrivances, on the other hand, can be devised for the protection of individual freedom and independence. Let us suppose, in the first place, that paternal government is the object to be sought, and that it is the mission of the state to provide for the welfare and to promote directly the progress of society. In this case it is evident that there ought to exist no institution which will enable private persons to bar that progress, or to prevent the state from carrying out its beneficent designs. It is clear that the best form

of government is one which will organize the majority into as compact a body as possible, and concentrate the whole force of the community against the individual. For a large country these requisites are, perhaps, to be found most completely realized in the parliamentary system of government as it is developing in England. I say developing, because, although parliamentary government in Great Britain is nearly two centuries old, it is only very recently that it has begun to adapt itself to the conditions of a widely extended franchise, and to form part of a democratic system. English institutions, although historically intricate, are to-day in their main features extremely simple. A single assembly wields the whole force of the nation. It is led, and in fact ruled, by a committee responsible to the majority of the members, who in their turn represent as nearly as possible the majority of the citizens. These are the chief outlines of the plan. Now if the object of government is to formulate and give effect to the wishes of the majority, among a people too numerous and too widely scattered to assemble and transact public business in a mass meeting, no better method of accomplishing that result could probably be devised. In such a case a more complicated system of legislative bodies would

be out of place, and the famous aphorism of the Abbé Sieyès applies to it perfectly: "If a second chamber dissents from the first" (and therefore from the popular majority), "it is mischievous; if it agrees, it is superfluous."

A representative is always less violent than a pure democracy, because the legislators have a keener sense of personal responsibility; but the parliamentary system is, in this respect, the nearest approach to a pure democracy that representative government is capable of furnishing, because a member of the dominant party in the popular chamber, by following blindly the lead of the ministry, can divest himself almost completely of responsibility for his own judgment, and feel that he conforms to the opinion of his constituents. The Swiss device of the referendum, although commonly supposed to savor of pure democracy far more than the English form of government, is in reality more conservative. It is simply a means by which the people can put a veto upon the acts of their representatives, and to the dismay of the radicals it has been used to defeat a number of their favorite measures. The reason for this has been suggested by Sir Henry Maine in his book on "Popular Government" (p. 97). "It is possible," he says, "by agitation or exhortation, to produce in the mind of the aver-

age citizen a vague impression that he desires a particular change. But when the agitation has settled down on the dregs, when the excitement has died away, when the subject has been threshed out, when the law is before him in all its detail, he is sure to find in it much that is likely to disturb his habits, his ideas, his prejudices, or his interests, and so, in the long run, he votes 'No' to every proposal." Whether we should be inclined to go to quite this length or not, it is clear that a man will often vote against a law although, in the heat of party strife, he may have helped to elect a candidate who announced a measure of the same nature as part of his political programme. It is one thing for a laborer to vote for a party which declares that it will protect him from the grinding oppression of the capitalist, but it is a very different thing for the same man to vote for a law which, under the name of protection, curtails his right to earn money as best he can. Now under a parliamentary government the vote for the candidate is the last word the citizen has to say upon the matter, and the member takes his seat believing that he has been given a mandate to carry his programme into effect. In England, indeed, as has been often pointed out, the parties are beginning to go farther than the popular mandate can be

supposed to require, and there are signs of a disposition to bid for the vote of various classes in the community by offers of legislation which will confer benefits on the many at the expense of the few.

Even the so-called initiative, an institution established in many of the Swiss cantons which enables a certain number of citizens to propose a law and require a popular vote upon it, is in some ways more conservative than the parliamentary system, because it does not present the same opportunities for organizing and consolidating a popular majority, and political parties exert in fact far less influence in Switzerland than in most other democratic countries. Some laws, it is true, have been enacted in the Swiss cantons which are far too radical for the English Parliament; but before this can be used as an argument to prove the radical nature of Swiss institutions, it would be necessary to make a careful comparison of the two peoples, of their social conditions, their habits of thought, and their respect for existing rights. It is to be remembered, moreover, that England is really only just beginning to be a democratic country; and it is highly important to observe that a law like that imposing a heavy progressive income tax is a very different thing in a comparatively poor country like Switzer-

land, from what it would be in a great and rich industrial nation like the English.

In a democratic country ruled by one all-powerful assembly, the only restraint upon the desires of the majority consists in a conservative tone of thought, an attachment to existing forms of law, and a reverence for them as something peculiarly sacred. A belief in the inherent perfection of the Code Napoleon is said to have had a marked effect in restraining law making in France, and in directing activity into political instead of legislative channels; and there is no doubt that such a sentiment can for a time exert a considerable influence, but it fades quickly away if brought into constant collision with the will of the majority. In France such collisions are much less frequent than they would be in England or America, because the right of the majority is in reality much less recognized. De Tocqueville has remarked[1] that the French philosophers before the Revolution, while extolling the rights of the majority and the infallibility of the human reason, in reality despised the majority, and admired only their own reason. The ardent French republican at the present day breathes the same spirit, and believes not only that the republic is the best form of govern-

[1] *Ancien Régime et la Revolution*, note to book iii. chap. i.

ment, and that the people are entitled to have it if they want it, but that they ought to have it whether they want it or not. The greatest danger to the French Republic consists in the blindness of its votaries, who cannot see that a large and influential part of the nation care more for the security of their civil and religious rights than for any form of government.

The English have shown in the past more respect for law and custom than any other people in modern times, but now this feeling is very sensibly diminishing, as any one can see who will compare the parliamentary debates of the last century with those which take place at the present day. The former turn, as Sir Henry Maine has pointed out, to a surprising extent, on questions of law. Parliament shut its ears when Burke argued that the taxation of the American colonies was inexpedient, and only wanted to hear whether it was legal or not. Whereas in all the recent debates it is not only universally assumed that Parliament has power as a matter of law to do whatever it pleases, but the whole issue is treated as one of expediency, and existing rights weigh little in the balance. The progress of thought has upset the old notion of natural rights, and has destroyed a great part of the reverence felt for legal traditions, and for that "glorious constitution" which used

to be the boast of Englishmen of all parties. It is also to be noticed, that the British constitution itself, with all that vast collection of charters, statutes, customs, and traditions which the word implies, never comprised anything designed to protect the individual against oppression by the majority. Take the authority of the House of Commons in matters of taxation. The fact that the king could levy no taxes without the consent of his faithful commons prevented him, no doubt, from becoming an absolute monarch like his brother of France; and the privilege of the lower house in originating bills of supply has had a great deal to do with the depression of the influence of the peers, but neither of these things was ever adapted to check the majority of the people, or even to prevent them from plundering their rich neighbors under the guise of taxation, if they felt inclined to do so. The provisions in the Bill of Rights, also, and the famous clause in Magna Charta, were not intended to restrain in any way the legislative power of Parliament. These great bulwarks of English liberty, as they were quite properly called, were very effective in shielding the people against attacks on the part of the king, but they have served their purpose, and now that the royal authority has faded to a shadow,

and the power of the House of Lords is not much more substantial, their usefulness has passed, and in the presence of democracy they have become as obsolete as armor in the face of cannon. These institutions have stamped one very important mark upon English democracy. They have secured to a great extent the absence of administrative government. They have made England a country of laws, and, by preventing the growth of large discretionary authority among officials, they have made it impossible for a dictator to usurp power in the name of the people. But they have put no check upon legislation. To so great an extent is this true, that private property in England is, on the whole, less secure from attack on the part of the government to-day than it was at the time of the Stuarts.

An opinion was delivered some years ago by an American judge in one of the Western States, in which this startling sentence occurs: "Even in *Great Britain*, esteemed to have the most liberal constitution on the *Eastern* continent, *Magna Charta* is not of sufficient potency to restrain the action of Parliament, as their judiciary does not, as a settled rule, bring laws to the test of its provisions. Laws are there overthrown only occasionally by judicial construction. Such a thing, indeed, as deciding a

law or royal decree unconstitutional, in an absolute government is unknown. Hence the oppression of the people."[1] But ridiculous as this scream of the American eagle certainly is, it may not be very long before we can say with truth: Hence the oppression of the minority!

The Americans are the only people who have set themselves to work to solve the problem of restraining the power of the majority, and this they have done deliberately, although the circumstances of the country and the historical traditions of the race have helped them very much in their task. The Constitution of the United States contained at first no bill of rights, and to many people this appeared a serious defect. They had been accustomed to look on Magna Charta, the Petition of Right, and the Bill of Rights as the groundwork of English liberty, and they had a feeling, somewhat vague perhaps, that without a similar declaration they would be exposed to tyranny. Hamilton met their objections in "The Federalist" (No. 84) by saying: "Bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. . . . It is evident, therefore, that according to their primitive sig-

[1] Perkins, J., in Beebe *v.* The State, 6 Ind. 501.

nification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything, they have no need of particular reservations." He pointed out, in short, the unquestionable fact that without a Bill of Rights the Americans were in the same position as the English were with one. But his opponents answered that wherever power was placed it was liable to be abused, and that just as Magna Charta and the Bill of Rights had been a shield to the English against their king, so they might be a shield to the Americans against the government. In those days, it was not executive tyranny that men chiefly dreaded, but oppression by the legislature. The attempt of the legislatures in several states to hinder the collection of private debts, or to cancel them in part by the issue of paper money, was a symptom of a tendency which alarmed the more serious members of the community, and Jefferson expressed a prevalent opinion when he wrote: "The executive, in our governments, is not the sole, it is scarcely the principal, object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for many years."

Several of the provisions in the English Bill of Rights — those concerning cruel and unusual punishments, and the right of all citizens to bear arms, to petition the government, and to be tried by jury — could easily be applied to Congress, and amounted to a prohibition of certain definite classes of legislation; but the provision borrowed from the famous clause of Magna Charta and put in the form, "No person shall be deprived of life, liberty, or property, without due process of law," lost its whole meaning when used with reference to a legislative body. The object of the charter signed by King John was simple enough. The barons, incensed by the king's lawlessness, arose in arms, and catching him defenseless at Runnymede, extorted from him a promise to keep the law in future. This was the practical side of the Great Charter. Philosophically it implied that the king was to exercise no legislative power, and in fact an agreement that no man should be disseized, outlawed, or destroyed, except according to the judgment of his peers or the law of the land, would afford no protection to the vassals of the crown if John had power to change that law to suit his pleasure. By "the law of the land" the barons meant the existing law, which could not be changed without their own

consent. Entirely misapprehending the force of this provision, or rather having no distinct idea of its effect, and regarding it very much as the Italian does the talisman which keeps off the evil eye, the American statesmen of a hundred years ago put it into the Bill of Rights, and left it as a puzzle for posterity to solve. It is clear that "due process of law" was not intended to include every process which the legislature chose to make law, because, if so, the provision would be nugatory; and it is equally clear that the phrase was not meant, like its prototype in the Great Charter, to refer only to existing law, or to law established by some body other than the one whose power the provision was designed to restrain, because in that case the legislature would be forbidden to make any change in the law to the detriment of individuals, and as there are few changes in the law which do not affect private rights more or less, it would virtually be deprived of legislative power altogether. Placed between the horns of this dilemma, the courts have been obliged to find a construction for the clause which leaves to the legislature a reasonable amount of discretion, and yet prevents vexatious interference with vested rights, and thus, quite without precedent in the history of the world, a body of constitutional law has been

formed which is not yet completely crystallized, but is being daily shaped by the decisions of the courts. In this way the blunder made in searching for restraints upon legislative power has turned out a most fortunate one; for the provision in question, together with those which forbid the taking of private property for public use without just compensation, and the enactment of laws impairing the obligation of contracts, lies at the foundation of all constitutional protection of private rights in the United States.

This example will suffice to prove that the founders of the American government, in annexing to their various constitutions Bills of Rights, had not always a definite idea of the effect of the provisions they adopted, but the object they proposed to themselves was perfectly clear. They intended to restrain the impulse of popular majorities, and more especially to prevent the legislature from becoming despotic and tyrannous. In order to accomplish this result they did not rely on Bills of Rights alone, but made use of many other devices, which deserve consideration. For the sake, of treating the subject more broadly, it may be worth while to inquire what are the essential features of a system which, with equality and democracy, shall attempt to maintain

individual rights, and see, as we proceed, how far these features are to be found in the American government. It is not, of course, to be supposed that all those things in the political system of the United States which helped to put a curb on the majority were deliberately planned by the framers of the Constitution for that purpose. Many expedients were forced upon them by the political condition of the country, and the working of the others was only partially foreseen; but it is easy, on the other hand, to give them too little credit for originality and forethought. For a long time there existed in America a superstition which attributed to these men a sort of omniscience in matters of statesmanship; but the pendulum has now swung in the opposite direction, and it is the habit, particularly among certain English critics, to treat the American institutions as a mere growth, a development of the British political system, in which deliberate creation had but little share. No doubt some of the most salient features of the American government, such as the single executive and the two houses of the legislature, were suggested by similar institutions in the mother country; yet even these were by no means simply copied or accepted under the blind influence of association or precedent, and in the convention

which framed the Constitution of the United States they were carefully discussed, and adopted on account of a distinct belief in their utility.

A mere sentiment of respect for traditional principles, or for private rights, may for a time have some effect in protecting a minority from hostile legislation, but in a progressive country, where public affairs are fearlessly discussed, it will not long stand the strain to which it is constantly subjected; and even if this sentiment is embodied in a formal document, set up as a caution to the government, and as a code of moral precepts which ought to be followed, there will be no difficulty in finding most excellent reasons for violating its principles. Danger to the state, imperative political necessity, etc., are excuses which commend themselves readily to any one who desires a change. The refusal by the possessor of political power to make use of it, requires the exercise of great self-restraint; and the art of framing a limited government, like the art of civilization itself, consists not only in developing the habit of self-control, but even more in removing temptation, and in making that self-control as little irksome and, indeed, as little conscious as possible.

Now there are three devices which are capa-

ble of promoting this result: first, an arrangement such that no organized political body can feel that the laws depend solely upon its own will, — can feel, in other words, that it has power to do whatever it pleases; second, the creation of several independent political bodies, each of which is restrained by the presence of the others; and, third, a process by which every possessor of political power can be made amenable to some final authority which will prevent him from overstepping the bounds prescribed for his action. Neither of these three things would stand long by itself, for they are dependent each upon the others, and form parts of one complete system, but for the sake of convenience and clearness it may be well to consider them separately.

The first device I have mentioned for facilitating political self-control is an arrangement such that no organized public body can have a sense of its own omnipotence, and in a democracy this means that the mass of the people, in which final and irresponsible power resides, must not be an organized body; must not, in other words, be in the habit of expressing its will by transacting public business directly, as was the case in Athens. It means also that there must exist no single body of representatives which has absolute authority to express

the popular will. It implies, in short, a system which will make it impossible for a desire to violate those fundamental principles which it is the object of the Constitution to maintain, to organize and manifest itself as a popular demand, or which will make this so difficult that it will happen only after the matter has been long considered, and the majority in favor of it is overwhelming. For this purpose political power must be divided among several bodies, no one of which represents the sovereign people, or has authority to express the popular will, except to a limited extent. Beyond the power intrusted to these bodies the expression of the popular will ought to involve an elaborate process, and be surrounded with considerable formality, so that a change in the laws, which does not lie within the scope of ordinary legislation, may not take place without the greatest possible amount of discussion and reflection. Like the bulkheads in a ship, which keep a loose cargo steady while the vessel is rolling, and prevent it from shifting to one side, these divisions of political power are very effective in preventing public opinion from surging violently in one direction, and destroying the equilibrium of the state. The object of such a system is, as I have said, to hinder any development or expression of popular desire

except within certain prescribed limits; and in the United States, where these principles have been applied, it is surprisingly difficult to find out the opinion of the American people upon a matter with which Congress has no power to deal. Take, for example, the subject of a national law regulating rent, and suppose a real demand for it. Such a law could be enacted only by means of an amendment to the Federal Constitution, and this requires the consent of three quarters of the States. But how can it be known whether that number of States are in favor of the measure or not? They have no common assembly in which their opinions on changes in the Constitution are expressed. Congress can proclaim its own views, but Congress has no authority to speak on the subject either for the nation or for the States, nor would any vote it might pass be regarded as an expression of popular will on a matter not legally within its competence. The people of the several States possess no common organ for making their opinions upon such a subject known, and the only way to discover their wishes is to propose a definite amendment to the Constitution, and see whether it is ratified by the required number of States; a process which is so cumbrous and uncertain that it is sure never to be attempted unless the amend-

ment is almost universally demanded, and its adoption is virtually beyond a doubt. The same thing is true to some extent in the separate States. In almost all of them an amendment to the Constitution of the State can be adopted only by popular vote,[1] and the people have no means of expressing their views upon the propriety of an amendment until it is submitted to them at the polls, for the distinction between a constitution and ordinary statute law is so clearly recognized that a vote of the legislature which touches the former is not regarded as at all equivalent to an expression of the popular will.

In order to make self-restraint as easy and unconscious as possible, it is important that the people should not be constantly in the habit of organizing and passing laws directly; and it is no less important, as I have pointed out, that political power should be divided among several bodies, no one of which has authority to declare the popular will, except within certain defined limits. The division of power in the United States is twofold; and while other prin-

[1] In many of the States a general revision of the Constitution can be undertaken by a convention specially elected for that purpose, after the question of calling the convention has been decided in the affirmative by popular vote, and in some of these cases the work of the convention need not be submitted to the people for ratification.

ciples of division can readily be imagined, the system in use here has the advantage of having stood the test of actual experiment.

In the first place, power is divided territorially, if I may be allowed so barbarous an expression; that is, it is placed partly in the hands of the central or federal government, whose authority is absolute within the limits prescribed for its action, and partly in those of the local or state governments, which are also supreme in the sphere reserved for them,— matters of more common interest being allotted to the federal government; those whose bearing is comparatively local, to the several States. The importance of such a division of power, in preventing any one political body from wielding the whole force of the nation, is obvious; and although it was not deliberately adopted by the people for the sake of limiting the power of their own representatives, but arose from the jealousies of the original States, and from their dread of submitting themselves unconditionally to a common government, yet it has become an integral part of the polity of the nation, and is as necessary for restraining popular impulse as the other principle of division which we are about to consider.

In the second place, the power of each government, whether state or federal, is distrib-

uted among several representative bodies. It is separated into legislative and executive (a distinction which deserves a more philosophical study than it has yet received); and the legislative power is vested partly in two chambers which possess the entire right of initiative, and partly in a single chief magistrate who is intrusted with a qualified veto. The executive power, on the other hand, is commonly said to be wholly in the hands of the chief magistrate, but as a matter of fact this also is divided to a very great extent. In the federal government it is shared in large measure by the Senate; and in many of the States it is not only very much under the control of a council or senate, but a considerable portion of it is intrusted to permanent boards or commissions, which are only very partially subject to the authority of the governor, — a state of things which is in some degree true of the national government also. In many of the States, indeed, a number of the great executive officers, such as the attorney-general and the secretary and treasurer, are elected by the people, and are in consequence almost completely independent.

It will perhaps be noticed that, in speaking of the separation of powers, the judiciary has been omitted. This is because the courts, while exercising a very great influence upon

the course of events, and wielding in reality a vast authority, do not possess political power in at all the same sense as the legislature and the executive. Their acts are not arbitrary, like those of the other departments of the government; and in making use of their most exalted function, that of putting a construction upon the Constitution, they attempt to carry out the popular will only so far as it has found its expression in the instrument they interpret.

The second contrivance I have referred to, as an aid to self-control on the part of the sovereign people, is the creation of several independent political bodies, each of which is restrained by the presence of the others. The division of power would clearly be a mere sham if the possessors of the several portions of it were not independent; if one of them, for example, could overawe or coerce the others; and in order that each one may feel that its power is limited, it is essential that they should all, actually as well as legally, enjoy complete liberty of action. In this case, like individuals in social life, they exercise a strong restraining influence upon one another, which tends to prevent any one of them from committing a breach of conventionality; a breach, that is, of the rules of conduct which the others consider it proper to observe. The existence,

in other words, of so many political bodies, all obeying the principles of constitutional law, tends to form and preserve a public morality on the subject which helps to prevent violations of those principles. Now the mere legal division of power will by no means secure the independence of the bodies among which it is distributed. In England, the crown still possesses by law almost the whole executive authority, and no one has ever doubted that a statute to be valid must pass the House of Lords, and receive the royal assent, but in reality the royal power has vanished, and the peers are unable to resist the House of Commons. The immediate cause of this is to be found, it is true, in the system of a responsible ministry; but there can be no doubt that if such an institution had never grown up, some other method of bringing about the same result would eventually have been devised, because hereditary personal government, whether by a monarch or a privileged aristocracy, has long ceased to be possible in Great Britain.

In a nation composed of different political classes or estates, each of which is in itself a source of real power, an effective division of political authority is natural and easy; but where the people is the sole political element,

it is necessary to make an artificial balance of independent forces, and this can be done only by giving to each of the public bodies among which power is divided a popular basis, so that every one of them may be to some extent a representative of the sovereign people. It is also necessary that each of these bodies should derive its authority from an independent source; for if one of them were appointed or elected by another, it could not fail to be very much under the control of the body to which it owed its power. If the President of the United States, for example, were elected by Congress, he would be unable to maintain his independence in face of the houses, but under the present system he is as truly the representative of the sovereign people as Congress itself. Andrew Jackson, indeed, habitually assumed for himself a sort of monopoly of the privilege of representing the masses; and although later presidents have been unable to perpetuate such a claim, the veto has never ceased to be freely exercised, and, strange to say, the use of it is in most cases highly popular. It is not necessary that every person to whom authority is intrusted should be elected directly by popular vote, but it is essential that he should not be chosen by a body whose power he is expected to counterbalance. This, however, is

merely a negative precaution, and will not by itself insure either real independence, or that divergence in point of view which is requisite for an effective division of power. To obtain this result, a delicate adjustment of political forces is necessary, and there is no feature of the American government which shows more ingenuity and skill than the contrivances which prevent the different representative bodies from being mere fac-similes of each other, and at the same time preserve their equality in point of power. In this matter, the success of the framers of the Constitution probably exceeded their expectations, for it is said to have been long believed that the Senate of the United States, which began its career as an assembly decidedly inferior in influence to the House of Representatives, would gradually lose much of the authority it possessed; but it turned out that the longer term of office, the share of executive power, and the fact that a senator represented an entire community, while a member of the House stood for an unorganized strip of territory, were enough to induce men of eminence and party leaders to prefer the smaller body, and thus the second chamber has not only been raised to a position of equality with the first, but has shown itself at times decidedly the superior. The Federal Senate

has not only achieved greatness for itself, but it has reflected a part of its glory upon the second chambers of the several States, although these bodies possess in general few of the advantages which have made the success of their prototype, for it is no doubt due in large measure to this borrowed lustre that a transfer from the House to the Senate of a State is looked upon as a promotion, — a state of things necessary in a democratic country to prevent the smaller body from occupying a distinctly inferior position.

There is another element which is not without influence in maintaining the independence of the bodies among which power is divided, but which has an especial importance in relation to what I have termed the territorial division of power; and that is, the corporate sentiment. The real independence of the state governments is due to the fact that each of them has its own history, its own traditions and associations, its own government and laws, and is, in short, a separate community. It would be impossible to establish a federal republic in France with the departments as constituent members, because the French departments are not communities with a feeling of common interests and common ties, but mere geographical divisions, and the central power in

such a federation would sweep aside any local opposition to its will with perfect ease. Communities cannot be manufactured by law. They are the result of a slow growth, but their existence is essential to any real limitation upon the arbitrary will of the central government; for without the sentiments which they call out, the local authorities can never possess that spirit of self-reliance which is an indispensable factor in any true division of power between the nation and its parts.

The third and last thing I have mentioned, as an assistance to popular self-control, is a process by which every possessor of political power can be made amenable to some final authority which will prevent him from overstepping the bounds prescribed for his action. This is a necessary feature in any effective system of dividing power, because without it there is nothing to hinder one branch of the government from gradually extending its authority, and encroaching on the others, until these become so enfeebled as to be unable to resist, and then all separation or limitation of power is at an end. The division of political authority, and the control of public officers by some independent tribunal, are, indeed, correlatives, neither of which, except under very peculiar conditions, can long exist without the

other. In his "Democracy in America" De Tocqueville speaks of the great number of local officers in the New England township, no one of whom is subordinate to another; and he remarks that the responsibility to an official superior, to which his countrymen were accustomed in France, is replaced by the liability to civil suit or criminal prosecution before the ordinary courts of law. This, he says, together with the frequent elections, is relied upon to prevent the town officers from being arbitrary or negligent; and he might have added that it was the very fact that political power was divided into so many fragments, so that each officer stood alone, responsible to no one, and therefore protected by no one, which made it easy to bring him into court and compel him to obey the common law.

It is important that the tribunal by which the limits of the various powers in the State are determined should be swayed as little as possible by the political passions of the day; that it should be impartial, and base its decisions upon principle and precedent; for if not, it would be in the same position as any other political body, and would in its turn require to be watched and restrained from exceeding its proper functions. It is also essential that this tribunal should not be brought into direct con-

flict with the government, because it would certainly be beaten in the struggle, and shorn of its power; and it is no less necessary to prevent questions about the limitations of power from arising in such a form that the whole weight of the State is on one side, and the individual on the other. The American has attempted to satisfy all these requirements by confiding the duty of deciding questions involving the limitations of the different branches of the government to the courts of law. By this means he has secured a tribunal which is impartial in a high degree, and decides according to fixed rules. He has also made it difficult for the State to bring a pressure to bear upon the court or the individual, because the court settles questions concerning the limits of political power as it does other points of law; that is, it decides them only when they are raised in the course of an actual suit between private persons, or between parties who appear before it in that character. By this means, the interpretation of the Constitution has been taken out of politics, as far as possible, while the principles established by that instrument have been put on the same footing as other rules applied by the courts, and made, as it were, a part of the common law. At the same time the American system diminishes the danger of collision

between the different political bodies among which power is distributed, because these bodies are not brought into direct contact, but act each in its own way directly on the people, the courts regulating conflicts of authority as they arise. If Congress passes a law which exceeds the powers granted to it, the States — now that the doctrine of nullification is dead — do not raise the question of constitutionality, and contend with the national government, but the law goes quietly into the statute-book, and any person who feels aggrieved by it brings it before the courts, as he would the by-law of a railroad company the validity of which he wanted to test.

The American form of government, with the immense power it gives to the courts, could not exist among a people whose reverence for law and whose love of litigation were not very great; nor could it endure without a provision for amendment, which acts as a safety valve and allows the steam to escape when the pressure becomes too great. The system would not be possible, moreover, if it did not rest on a popular basis, for no merits it might possess would have preserved it if, instead of being established by the people, it had been a relic of an aristocratic state of society. The French publicists speak of the advantage possessed by

a republic in dealing with insurrections, saying that it can put them down without arousing the sense of oppression which would be caused by the same acts on the part of a monarchy; and this they ascribe to the fact that a republic is the government of the people, and its acts are the acts of the people themselves. Now the same principle applies to the authority of the American court in constitutional questions, because a legislature which passes an unconstitutional statute is usurping power over the people, and the court, in refusing to enforce such a statute, is giving effect to the popular will. In order, therefore, to limit the power of the legislature, and maintain the authority of the court, it is necessary to draw a sharp line between constitutional and other laws, and to make it clear that the former embody in a peculiar degree the wishes of the people. This is done very thoroughly in America, where the action of the legislature is sufficient for all ordinary laws, while amendments to the Federal Constitution are submitted for approval to the several States, and changes in the constitution of a State require almost universally a vote of the citizens. It is worthy of remark that the Swiss institution of the referendum, while practically long in use in the United States for constitutional matters, would be quite out of place for

ordinary laws, because it would obscure the distinction on which the whole American system rests, and for this reason the growing tendency of the people of the States to take a direct part in legislation by means of constitutional amendments is a danger, and if it goes too far will be a serious injury, to our system of government.

Such are the main features of a government which, with the most complete acceptance of democracy, aims at the protection of private rights. No institutions can shield these entirely from attack, because the number of rights which can be effectually protected by the Constitution is very limited, and the legislature must always retain sufficient power to disturb seriously all social relations, if it is determined to make use for this purpose of the means at its command. The utmost that a constitution can be expected to do is to protect directly a small number of vested rights, and to discourage and check indirectly the growth of a demand for radical measures. How far the institutions of the United States have succeeded in doing this cannot be determined with precision, because it is impossible to estimate the effect of the many social forces which have influenced the history of the nation. To some observers, it may seem that, in spite of all precautions,

legislation in the New World is very radical, and interferes seriously with the liberty of the individual: but it must not be forgotten that in America the people have had absolute power in their hands far longer than in any European country; and if in addition to this it is considered how little respect the American has for the past, and how ready he is to try experiments, it becomes clear that his constitutions must have exercised upon him a great restraining influence. England, France, Germany, and Switzerland have passed laws which in some ways interfere with private rights more than any statutes enacted in the United States, and more than one of these bids fair to go far beyond us in this direction before many years have passed.

Of demagogism in America there is no lack, but it is of a new and indigenous kind, and might well be classified as the demagogism of ambiguous phrases. If the demagogue ever gets a foothold in the British Isles, he will be cut after the well-known Athenian pattern. He will stir up class against class, and try to tempt the crowd to bear him on their shoulders by offering to scatter among them the money of the rich. But the American politician resorts to no such arts. He usually attempts, on the contrary, to conciliate all classes, and de-

lights in such language as "a tariff for revenue only, so adjusted as to protect American industries;" an expression intended to win the votes of the free-traders without offending the protectionists. He is a member of an army of office-seekers, whose warfare is not directed against private rights, or the interests of particular classes, or even against what might be considered crying abuses, but is waged chiefly with a rival army of office-seekers; and the spoils of victory, in the form of public offices, are not distributed among the mass of voters, or common soldiers of the party, but are allotted strictly to the officers who have organized and disciplined these voters, — to persons more vulgarly called the workers or wire-pullers of the party. The result is, that party agitation in America does not in general involve any threat against the property or rights of private persons, and that those statutes which may be classed as socialistic rarely find a place in party programmes, and are not carried by party votes. This state of things is not an accident. It is the natural consequence of the political system of the United States.

Since this essay was written, Mr. Bryce's book on the American Commonwealth has appeared, in which a chapter entitled *Laissez-faire*

is devoted to the matter we are considering. The author comes to the conclusion that "the new democracies of America are just as eager for state interference as the democracy of England, and try their experiments with even more light-hearted promptitude." The chapter is followed by a number of tables intended to prove the statement, but unfortunately these were not compiled by Mr. Bryce himself, and do not show the accuracy and thoroughness which is so striking in the rest of the book. Their defect lies in the fact that they cover only a part of the subjects of state interference, and do not extend to that one in which the tendency of recent English legislation is the most marked.

Owing partly to the condition of landed property in England, partly to the prominence of Irish questions, and partly to the ascendency in English politics which the Manchester school of public men acquired during the struggle for the repeal of the Corn Laws, and retains to some extent even at the present day, state interference in Great Britain has been far more pronounced in the case of land than in that of manufactures. The influence of the last of these causes may be illustrated by a comparison with Germany, where Bismarck has for several years been at war with the man-

ufacturers, and rested upon the support of the land-owners, and where in consequence socialistic legislation bears almost entirely upon mechanical industry.

It may be doubted whether state interference even in the case of manufactures has gone so far in America as in England, for it has been confined here to providing what employers shall or shall not do, and has not directly touched the liberty of the workman; but in England there is a statute (Factory and Workshop Act, 1883) which provides not only that the owner of a white-lead factory shall furnish hot and cold water, soap, towels, brushes, separate rooms for meals, and acidulated drinks, but also subjects to a fine any person employed who refuses to make use of these things. It is safe to assert that the liberty of the free American has never been so far infringed as to compel him to use hot water and soap if he did not want to do so. If we take into account statutes touching land, we shall see that Parliament is not only more inclined to socialistic measures than our legislatures, but is far more ready to pass laws for the benefit of one class in the community at the expense of others. One of the few subjects, indeed, in which state interference has gone farther in America than in England is the sale of liquor; and the move-

ment in this case is purely philanthropic, and is designed to protect the poor, not against the rich, but against themselves.

A short review of a few of the more prominent acts recently passed by Parliament which affect land will help to make this clear.

The Artisans and Laborers Dwellings Improvement Act, 1875, authorizes certain municipal authorities in the larger towns of England and Ireland to take under certain conditions, and on paying compensation to the owner, any district covered with buildings in an improper sanitary condition, tear down the houses, and sell or let the land, for the purpose of carrying out a scheme of improvement. A similar act was passed for Scotland in the same year; and by amendments passed at various times, the authority of municipal bodies under these acts has been increased.

But Parliament has gone even farther in the same path in a series of laws of which the most striking is the Housing of the Working Classes Act, 1885. This statute, which applies to the whole of the United Kingdom, extends the operation of an act of 1851, and under certain conditions empowers local authorities, urban and rural, when of opinion that more accommodation is necessary for the working classes, to buy land for that purpose, or take it

on paying compensation, build cottages or lodging-houses, and let them for the use of laborers.

A statute of similar nature (Allotments Act, 1887) provides that when the local sanitary authority in England is of opinion that there is a demand for agricultural allotments or for pasturage for the use of laborers, and that these cannot be obtained at a reasonable rent, it may under certain conditions buy, hire, or take land on paying compensation therefor, and let it to laborers. In this statute there are provisions designed to prevent the cost from exceeding the receipts, but of course it must often happen that such a result is impossible, and provision is made for supplying the deficit by loans; which means, ultimately, by taxation.

The power which these acts give to cities and other political bodies to distribute lands and tenements among the poor at the expense of the rich, or to become landlords on a large scale and thereby regulate rents, is certainly a long step in the direction of socialism.

Another statute that ought perhaps to be mentioned is the famous Ground Game Act of 1880, which gives to tenants a right to kill hares and rabbits on land let to them, and interferes with the freedom of contract by providing that any clause in a lease which restricts the right given by the statute shall be void.

Let us glance for a moment at the special land acts passed for Ireland. The chief of these is the Land Law (Ireland) Act, 1881, which gives the tenant farmer a vested right in the land unaffected by the ending of his term, and provides that he may sell his tenancy under certain restrictions, and shall never have his rent raised, or be turned out, except for non-payment of rent, or a breach of certain conditions fixed by the act. If, indeed, the landlord wishes to use the land for certain purposes approved by the court, he may do so, but in that case he must pay to the tenant a compensation for disturbance. It is further provided that either party may apply to the land court to fix a fair rent, which shall then be binding for fifteen years. The next year another step was taken in the Arrears of Rent (Ireland) Act, 1882, which provides that when a tenant has paid his rent for the last year, but is indebted for arrears which he is unable to discharge, the Land Commission may pay to the landlord one half of these arrears on the tenant's account, the other half being thereby extinguished. Five years later it was enacted (Land Law (Ireland) Act, 1887) that, owing to the fall in the price of agricultural products there should be a wholesale revision of the fair rents already fixed, and the court was empowered, when of opinion that

a tenant is unable to pay rent without fault on his part, to stay eviction and grant delay.

Parallel to these enactments there are corresponding provisions to protect the farm laborer against the tenant. By these the Land Commission is empowered to order the tenant to improve or build cottages for the laborers he employs, and to assign them allotments. And in such cases the Commission is authorized to fix the rent to be paid by the laborer.

The most obvious effect of these acts is the confiscation of a certain amount of rent to which the landlord would otherwise be entitled. It will also be noticed that they virtually transfer the ownership of the land to the tenant, reserving to the landlord in its stead a constantly diminishing rent charge. But the most ominous feature of this legislation is to be found in the fact that all right to arrange the terms of a certain class of leases is taken away from the parties interested, and vested in the government. A complete confiscation like that by which the slaves were freed at the end of our Civil War, although causing more suffering at first, would probably entail on posterity less danger than this plan of the control of rents by the state.

The land acts for Ireland have been passed under circumstances so peculiar, and, like the

emancipation of the negroes to which I have referred, have been so much the result of a great political movement, that they are not a fair criterion of the tendencies of Parliament; and yet they are important as a symptom of the influences at work in public opinion in England, especially as provisions of a similar nature have been made for the benefit of the Scotch crofters, although no such political necessity exists in their case.

The Crofters Holdings (Scotland) Act, 1886, contains substantially the same provisions as the Land Law (Ireland) Act, 1881, except that the tenant cannot sell his holding. It passes, however, to his heirs, and he may devise it under certain restrictions. The act gives to the Crofters' Commission power to fix rents for the future, and in case arrears are due, it gives the Commission authority to determine what part of them shall be paid, and to cancel the rest.

The most astounding statute of all remains to be mentioned, and it applies alike to England, Scotland, and Ireland. By the Settled Land Act, 1882, any person having a life interest in an entailed or settled estate was allowed to sell, exchange, or lease the whole estate, provided he obtained the highest price or the best terms possible; the proceeds to be invested and to follow the terms of the settlement.

Now in 1885, when the enthusiasm about dwellings for laborers ran very high, it was enacted in the Housing of the Working Classes Act, 1885, section 11, that a sale, exchange, or lease of land under the Settled Land Act, for the purpose of erecting on such land dwellings for the laboring classes, might be made at the best price obtainable for that purpose, although a higher price might be obtained for some other purpose. A life tenant, in other words, who feels inclined to give a part of his life interest to this kind of charity, is authorized to give a corresponding share of the property of the remainder-man to the same object.

These few specimens of British legislation are enough for our purpose, the more so because they affect not only agricultural land, which is subject to very peculiar conditions in England, but also land in cities, the position of which does not differ essentially in England and America; and bearing this in mind it must be evident to every reader that tables like those in Mr. Bryce's book, which leave out all statutes touching land, give no fair comparison of state interference on the two sides of the Atlantic. It is safe to say that no laws even distantly resembling those we have reviewed have been enacted in the United States; and the conclusion is therefore just that

England, although only beginning to be a democracy, has already gone farther in the direction of socialism than the communities on this side of the ocean.

III.

THE RESPONSIBILITIES OF AMERICAN LAWYERS.

> Che val, perchè ti racconciasse 'l freno
> Giustiniano, se la sella è vota ?
> DANTE, Purgatorio, Canto vi.

IT is one of the popular fallacies of the present day that the responsibility for the state of the law rests entirely with the legislative branch of the government. In reality, this responsibility is in every country shared to a great extent by the legal profession; and the slow development of the law which results from the writings of jurists, the judgments of courts, and the customary practice of lawyers, is, perhaps, more irresistible, because less noticed, than the violent changes produced by direct legislation. This is especially true in countries where the decisions rendered in actual cases furnish the main source of legal authority; but it is not the general responsibility of lawyers, in lands where the common law prevails, that I wish to consider. It is the more restricted but more weighty duty

which is laid upon the legal profession in America by the peculiar nature of our system of government.

The immense power given to the courts by our constitutions is so familiar to us that remark upon it has become commonplace, and for that very reason we sometimes fail to realize its true significance as fully as does the foreigner to whom it is a subject of astonishment. We are in the habit of speaking of our political system as a government by the people, carried on by means of three coördinate branches, — the executive, the legislative, and the judicial; but when these expressions are examined carefully, it is evident that they are misleading, and perhaps inaccurate, at least in the sense in which they are commonly understood. These three branches, in the first place, are called coördinate, and work each in a separate and defined province; and yet, as must of necessity be the case in human affairs, the lines of demarcation are not always clear, and unless confusion is to be endless, a power must exist somewhere to determine the limits of the separate provinces, and to decide controversies in regard to them. The power to do this has been confided to the courts in accordance with the principles of the common law, if not by the express provisions of the Constitution.

The effect upon the other branches of the government of a decision by the Supreme Court on a point of constitutional law has given rise to some difference of opinion, and although an extended discussion of the question would be interesting only to lawyers, a few words of explanation may help to make the subject clear to those who are not familiar with law. A decision by the highest court of appeal has two distinct effects. In the first place, it is absolutely and finally binding on the parties to the suit and all persons claiming under them, but it is binding on no one else. In the second place, it establishes a precedent which, under ordinary circumstances, is morally certain to be followed whenever the same question is again presented to the court; and it is in consequence of this second effect of a decision that the court has virtually power to settle the law. In the United States, all officers of the government are subject to the ordinary rules of law;[1] and while the courts have no general power to command the performance of official duties, a public officer can be sued or prosecuted for violations of the law, like any other citizen, and his official position or the orders of his superior are no defence to

[1] There are a few exceptions, such, for example, as that of soldiers, in some of the States, when called out to suppress a riot, etc.

him. If he has done any act in excess of his authority, he is liable for it, precisely as any one else who had done the same act would be; and it is for the ordinary courts of law to decide whether the act in question is beyond his authority or not. If, therefore, the court has decided that a certain statute is unconstitutional, every one knows that he may treat that statute as invalid. He knows that the court will give him redress against any person, whether public officer or private citizen, who injures him under color of its provisions; and he knows that he may resist any officer or other person who attempts to enforce it, and that he will be held harmless for so doing. In many of the continental countries of Europe a public officer is exempt from the ordinary process of law, either by virtue of a provision that he cannot be sued or prosecuted in the ordinary courts, on account of any act done under color of his office, without the consent of a council composed of his official superiors, or because his acts are cognizable only by special administrative tribunals; and where this is true, it is clear that the judiciary cannot by their decisions bind the other branches of the government. There is, in those countries, one law for the citizen and another for the public servant; and, in fact, the rights and duties of

the latter are regulated by a vast body of special law known in France as the *droit administratif*, which falls entirely outside the jurisdiction of the ordinary courts. By such means the executive has been made really independent of the judiciary.[1] But nothing of this kind is true in the United States. There is here only one law, administered by one set of tribunals, to whose jurisdiction every one is subject. It follows that the law administered by the courts is the one law of the land, binding on all persons and all branches of the government. This must of necessity be the case so long as public officers are amenable to the ordinary process of the courts, and it is as true of constitutional as of the common law, so far at least as the rights of individuals are concerned. The fact is, that a great deal of confusion has been introduced into this subject by regarding the provisions of the Constitution as a statement of political maxims, instead of a source of positive law. If it is admitted — as no one now attempts seriously to deny — that the Constitution has the effect of a law enacted by a body of higher legislative authority than Congress, the question is really cleared of most of its difficulty, for no one doubts

[1] This matter is admirably treated in A. V. Dicey's *Law of the Constitution*, London, 1885.

that the executive is bound by a judicial construction of a statute.

These statements must, of course, be understood with the qualification that the courts have authority to determine the limits of the powers granted by the Constitution only when the question is presented in actual litigation. But as there is no question of this sort which may not arise in an actual case, the qualification does not impair the correctness of the principle.

The judicial branch of the government is, therefore, the final arbiter and ultimate authority on all matters touching the limits of the powers granted by the Constitution. It possesses no direct initiative, but it is the sole and final judge of its own rights, as well as of those of the executive and legislature; and in this sense, while greatly inferior in force, it is superior in authority to the other two branches of the government.

Let us consider for a moment the nature of the body in which this vast power is vested. The executive and legislature are elected by the people, or by some rough approximation to a majority of the people, and in a general way they are expected to carry out the wishes of their constituents; but the courts stand in a very different position. They are not, in the

ordinary meaning of the word, the representatives of the people, and it is not their mission to enforce the popular will. To some extent, it is true, the opinion has prevailed that the judges, like all other public servants, ought to depend for office upon popular esteem or approval; and in many States laws have been passed providing that they shall be elected by the people for limited terms. But, happily, the influence of such ideas appears to be on the wane; for the lengthening of these terms, and the provisions forbidding reëlection, seem to indicate a return to a more rational view of the functions of the judiciary. If it were the duty of the courts to give effect to the wishes of the people upon constitutional questions, our government would be a truly absurd one. The judicial body would then be a sort of additional legislature extremely ill-fitted for its task. But, in fact, the duty of the courts is almost the reverse of this, because the popular desire for a law may very well be presumed from the fact that it has been passed by the legislature, and the courts are given power to treat a statute as invalid in order that they may thwart the popular will in cases where that will conflicts with the provisions of the Constitution. Now, the Constitution is always older than the law in question, and may be more

ancient by a century, so that the court, in deciding that a law is unconstitutional, declares, in effect, that the present wishes of the people cannot be carried out, because opposed to their previous intention, or to the views of their remote ancestors. All our constitutions have a safety-valve, no doubt, in the power of amendment, so that any of them can be changed by a sufficient proportion of the voters, if they persist long enough in the same opinion; but this, while modifying, does not do away with the fact that it is often the duty of our courts to defeat the immediate wishes of a majority of the people. Stated in such a form, the power of our judiciary is certainly very startling; and it is even more surprising that a power so extensive should have been placed in the hands of a small number of men, chosen exclusively from one profession, and this among a people who are jealous of the influence of all associations and professions, and who are impatient of authority of every kind. The truth is that our fathers, while admitting the right of the people to govern within certain limits, believed that there were principles more important than the execution of every popular wish, and rights which ought not to be violated by the impulse and excitement of a majority; and the constitutional provisions established by

them remain in force to-day, because we still believe in the sacredness of the principles which they preached. These principles stand on the same ground as moral precepts. The restraints they place upon us are not always agreeable, but we continue to uphold them, because we believe in their inherent righteousness and in their importance to the well-being of the world. The duty of watching over and guarding these fundamental principles, — these legal morals, if I may be allowed the term, — of developing, explaining, and defending them, rests with the legal profession; and if this is true, it is surely difficult to overestimate the responsibility of lawyers in America.

I have said that the constitutional principles taught by our fathers retain their force to-day because we still believe in them; but the statement requires some explanation. For a long time the Constitution of the United States was the object of what has been called a fetish worship; that is, it was regarded as something peculiarly sacred, and received an unquestioned homage for reasons quite apart from any virtues of its own. The Constitution was to us what a king has often been to other nations. It was the symbol and pledge of our national existence, and the only object on which the people could expend their new-born loyalty. Let us hope

that such a feeling will never die out, for it is a purifying and ennobling one; but to-day our national union is so fully accomplished, that we need no symbol or pledge to assure us of the fact, and we can no longer expect the blind veneration for our Constitution which prevailed in the first decades of the century. This is a time when all forms of government are being put to the test, and our own must approve itself by the excellence of the principles upon which it is built. At the present moment the power lodged with the courts appears to be one of the most stable features of our government; and in fact we are so accustomed to see judicial decisions readily accepted and implicitly obeyed, that we cannot help attributing to them a mysterious intrinsic force. We are naturally in the habit of ascribing to the courts a sort of supernatural power to regulate the affairs of men, and to restrain the excesses and curb the passions of the people. We forget that no such power can really exist, and that no court can hinder a people that is determined to have its way; in short, that nothing can control the popular will except the sober good sense of the people themselves. One has only to turn his eyes to France to see the truth of this statement. That country has had a dozen constitutions, each as sacred as such an

instrument can be, but they have all been short-lived, and no one supposes that their frail existence could have been preserved by granting to the French courts the powers possessed by our own. The cause of such a state of things is obvious. The French constitutions are the work of a party, and the people at large are more anxious to accomplish their immediate aims than to maintain the theoretical doctrines embodied in these instruments. The reverse of this is true here, and it is because our people care more for their Constitution than for any single law enacted by the legislature that constitutional government is possible among us. So long as such a feeling continues, our Constitution and the power of our courts will remain unimpaired; but if at any time the people conclude that constitutional law, as interpreted by lawyers, is absurd or irrational, the power of the judiciary will inevitably vanish, and a great part of the Constitution will be irretrievably swept away. Our constitutional law depends for its force upon the fact that it approves itself to the good sense of the people, and the power of the courts is held upon condition that the precedents established by them are wise, statesmanlike, and founded upon enduring principles of justice which are worthy of the respect of the community.

How, then, it may be asked, are the courts to make their decisions respected and approved by the people? By catching the current of popular opinion, and leaning towards that interpretation of constitutional questions which the wants of the day appear to demand? By no means. Such a course is of all the best calculated in the long run to bring the judiciary into disrepute, for it makes of them a political instead of a legal body. To suggest it shows an entire want of appreciation of the genius of our people; and, in fact, the cases in which the bench has suffered the greatest loss of influence have been those in which it has allowed popular excitement, or party prejudice, which is really the same thing, to affect its opinions. What is needed to maintain the esteem in which the courts are now held is a careful study of the principles established by the Constitution, and a clear development of the theories of constitutional law; not theory in the narrow sense of something contrasted and often irreconcilable with practice. Theory in this sense is nothing more than a set of doctrines at best the logical result of premises more or less inaccurate. It is extremely easy to manufacture, and is justly an object of suspicion with the public. What we need in the study of Constitutional law is theory in a higher sense.

We need that ripe scholarship which regards theory as truth stated in an abstract form, to be constantly measured by practice as a test of its correctness; for theory and practice are in reality correlatives, each of which requires the aid of the other for its own proper development. It often happens, when some zealous student propounds a striking principle whereby all the problems in the world can be solved by a simple formula, that a by-stander remarks: "That may be all very well in theory, but it will not work in practice." This saying is a very common one, but it is founded on a most pernicious error; for either it uses the word "theory" in the ridiculous sense of something which ought to be true, and would be true if the world were properly constructed, or else it assumes that a theory may be correct although inconsistent with the facts or practice which it attempts to explain: whereas in reality a theory which does not agree with the facts, or will not work in practice, is simply wrong. A practice, on the other hand, which is not guided and enlightened by abstract or theoretical study is short-sighted, unprogressive, and extremely likely to be based upon a blunder.

It may seem to the reader that there is no danger of committing either of these errors in the study of constitutional law, but a careful

review of the decisions on the subject, especially those to be found in some of the state reports, will convince him that the judges have been constantly falling into one or the other of these pitfalls, and sometimes, strange as the feat may appear, into both of them at the same time. There are many decisions in which the court evidently had no principle of general application in mind at all; others where the opinion is based upon some high-sounding but entirely inaccurate generality, which, if literally applied, would overrule half the cases and upset the whole fabric of constitutional law; and there are not a few cases in which the generality is enunciated with solemn gravity, while it is perfectly clear that it had nothing to do with the decision, which was determined by the judge's general impression of the case. Let me not be supposed to apply any of this language to the decisions of our great constitutional lawyers. On the contrary, I have the highest appreciation of the labors of these men, and I feel that their country owes them an eternal debt of gratitude. Marshall, who set the tone for his successors, combined the wisdom of the philosopher with the good sense of the magistrate, and it is precisely because these qualities are so rarely united that I wish to insist on the importance of both of them, and

to signalize the evils which may flow from the absence of either.

Those persons who regard the provisions of the Constitution, and particularly the ones designed to protect the rights of the individual, not as a mere collection of arbitrary rules, but as a set of principles adapted to promote the happiness and prosperity of the people, will find it easy to believe that these principles, clearly expounded and wisely applied, cannot fail to retain their hold upon the respect of the citizen.

A careful study of constitutional law is especially important at this time, because the fourteenth amendment to the Constitution of the United States has furnished an opportunity for a review of the decisions of the state courts upon a most important branch of the law. The first ten amendments to the Constitution, including the provision that no one shall be deprived of life, liberty, or property without due process of law, were adopted, as it was early settled, solely for the purpose of limiting the power of Congress. They imposed no restraint upon the legislative power of the several States; and as Congress found few occasions to violate this provision, the federal judges were seldom required to put a construction upon it. The state constitutions, however, con-

tain similar clauses, and the state courts have had abundant opportunities to interpret them. Now, the fourteenth amendment, adopted after the close of the civil war, contains a provision extending the same limitation to the power of the several States, and in this way the acts of the state legislatures which are supposed to violate the rights thereby secured have been drawn within the jurisdiction of the courts of the United States. The great branch of constitutional law, therefore, which depends upon this important part of the Bill of Rights is now being reviewed by the federal judges, who are not bound by the decisions made in the state courts, and yet have the benefit of the experience of a century.[1]

What I have said may appear to touch only the judges, and to have no application to the profession at large. But, in the first place, it must be remembered that the judges are selected from the ranks of the profession, and that in the long run their views upon the importance of constitutional law, and their sense of the great responsibility of their position, must be derived mainly from the profession in which they were bred. It is not, however, only

[1] In its recent decisions the Supreme Court seems to be inclined to attribute less importance to this provision than might be wished.

as the great mother of judges that the legal profession is involved in this responsibility. Every lawyer may become engaged in suits turning upon points of constitutional law. He then finds himself arguing questions which among other nations are determined by a popular assembly or parliament of the realm, and he argues before a court whose decision becomes a precedent, often more difficult to shake than any act of Parliament. Every American lawyer is in a sense a statesman by virtue of his profession, and may at any time find himself called upon to take part in deciding questions destined to leave a lasting mark upon the government of his country. His position differs in one very important respect, it is true, from that of a member of Parliament, for he appears on the side which he is retained to represent, and not on that which he believes to be right, — a state of things which it is useless to try to explain to a layman, and which to a lawyer needs no explanation. And yet even the layman may be ready to grant that an exalted sense of the importance of the subject, broad views, and a strong grasp of constitutional principles, on the part of the advocates cannot fail to have a very great effect upon the decision of the court.

Some cynic, who has had the patience to

read so far, will no doubt remark that the legal profession is not a charitable institution, and that men practice law to get money and support themselves, and not from philanthropic motives. To this I answer that no profession can be great unless the money-making aims of the individual are leavened by a sense of the importance of his vocation, and of the dignity of the body that pursues it. A man who is unconscious of the strength of the *esprit de corps* of a great profession, of its power to inspire its members with a high and noble ambition, and to make itself an end and not a mere means of making money, — a man who has never felt this has failed to appreciate one of the most valuable of human qualities. He has only to turn his eyes to the doctors to see its force, and no careful search is required to find it among lawyers. This is the quality which we need to foster, because its influence upon the moral and intellectual condition of the legal profession is great, and because it is upon that profession that we must chiefly rely for the preservation of constitutional principles in this country.

IV.

THE THEORY OF THE SOCIAL COMPACT.

A SKETCH OF ITS HISTORY.

L'homme est né libre, et par-tout il est dans les fers. Tel se croit le maitre des autres, qui ne laisse pas d'être plus esclave qu'eux. Comment ce changement s'est-il fait? je l'ignore. Qu'est-ce qui peut le rendre légitime? je crois pouvoir résoudre cette question. — ROUSSEAU, *Contrat Social*, livre i. chap. i.

THE political capacity of the English people is due in large measure to their great ingenuity in inventing political theories, and their obstinate skepticism in refusing to believe in them. Perhaps no better illustration of these qualities can be found than in the history of that extraordinary theory which, under the name of the "social compact," influenced deeply the political thought of Europe and America for two centuries. And it is not the least singular fact about a doctrine which proved so destructive to the existing order of things in Europe that it should have originated with a clergyman of the Church of England, and should have been invented by him for the purpose of defending the Established Church against the attacks of

its enemies. But in fact the position of the Church of England during the reign of Elizabeth, and for a good while afterwards, was extremely difficult; for it was assailed on one side by the Catholics, who claimed the authority of a divinely inspired church, and on the other by the Puritans, who referred their system of organization to the express teaching of the Bible. Under these circumstances, the "judicious Hooker," as he was afterwards called, instead of meeting his opponents on their own ground by claiming a divine origin for the English ecclesiastical system, parried their attacks by denying that any religious body is under direct divine guidance in all matters, and asserting that laws for the government of the church may be made by men, and that, if according to reason and not repugnant to Scripture, they are authorized by God.

Hooker begins his "Ecclesiastical Polity"[1] with a discussion of laws in general. He treats of the condition of men before the existence of civil society, showing how force might then be resisted by force, and no one had a right to constitute himself a judge in his own case. To escape from this state of things "there was no way but only by growing unto composition and agreement amongst themselves,

[1] Published in 1594.

by ordaining some kind of government public, and by yielding themselves subject thereto." A father, he says, has by nature a supreme power within his own family, but rulers "not having the natural superiority of fathers, their power must needs be either usurped, and then unlawful; or, if lawful, then either granted or consented unto by them over whom they exercise the same, or else given extraordinarily from God, unto whom all the world is subject." Disregarding the last alternative, Hooker bases government upon the consent of the governed. Not that these need give a special assent to each separate law, for it is enough if they agree, once for all, that their rulers shall have authority to make laws for them. "And to be commanded we do consent," he says, "when that society whereof we are part hath at any time before consented, without revoking the same after by the like universal agreement. Wherefore as any man's deed past is good as long as himself continueth; so the act of a public society of men done five hundred years sithence standeth as theirs who presently are of the same societies, because corporations are immortal; we were then alive in our predecessors, and they in their successors do live still. Laws therefore human, of what kind soever, are available by consent."

Such was the origin of the theory of the social compact; for although the idea that the authority of the ruler is conferred upon him by the people was not new, I am not aware that any one before Hooker deduced the universal lawfulness of laws from the voluntary association of individuals to form a civil society.[1]

It would not be safe, however, to make too positive a statement in regard to Hooker's claim as first inventor, and it is by no means impossible that the theory may have been originated by several persons independently during the last part of the sixteenth and the early part of the seventeenth centuries. The course of thought had for many years been such as to prepare men's minds to produce and accept a theory of this kind; and, indeed, the doctrine that the authority of the king is derived from the consent of his people had recently become very prominent, and had developed until it assumed a form only a little less complete than that of the theory enun-

[1] Fortescue, writing about the end of the Wars of the Roses, divides monarchs into two classes : those whose power is founded on conquest, and whose authority is absolute; and those whose power is derived from a compact made by the community in forming a body politic, and whose authority is limited. (*De Laudibus Legum Angliæ*, ch. 11–13 ; *The Governance of England*, ch. 1, 2). He places the king of France in the former class, and the king of England in the latter. This partial theory of a social compact may have been drawn by him from earlier sources.

ciated by Hooker. The desire to get rid of an obnoxious monarch always acted as a strong spur to drive men to opinions which made his tenure of power dependent upon the will of his subjects. The English and Scotch Protestants smarting under the persecutions of the two Marys, the Catholic league in France furious with Henry III., and in their train the Jesuits, all insisted on the right of deposing a king, and often went so far as to justify his assassination. But while their doctrines were similar they were not identical; for the Jesuits maintained that a king must be deposed by the Pope before he could be murdered by a subject, while the Protestants recognized no such limitation.

The theory once started soon became popular, and before long it was put into practice; for the first social compact known to history was made on the 11th of November, 1620, in the cabin of the Mayflower. It was clearly no desire to uphold the polity of the Church of England which induced the Pilgrim Fathers thus to emerge from a state of barbarism; nor does this document appear to have been the result of any democratic doctrines, but rather, as Bradford tells us, of threats of insubordination on the part of certain persons on board, whom no one had power to control, because the patent issued in favor of the Pil-

grims covered only a part of the territory then called Virginia, and did not extend to New England.[1] The colonists found themselves much in the position of the navigator who sailed off his chart, and was obliged to devise a new one to cover the emergency. The agreement was probably signed by all the men of the party, and it reads as follows: —

"In y^e^ name of God, Amen. We whose names are underwriten, the loyall subjects of our dread soveraigne Lord, King James, by y^e^ grace of God, of Great Britaine, Franc, & Ireland king, defender of y^e^ faith, &c., haveing undertaken, for y^e^ glorie of God, and advancemente of y^e^ Christian faith, and honour of our king & countrie, a voyage to plant y^e^ first colonie in y^e^ Northerne parts of Virginnia, doe by these presents solemnly & mutualy in y^e^ presence of God, and one of another, covenant & combine our selves togeather into a civill body politick, for our better ordering & preservation & furtherance of y^e^ ends aforesaid; and by vertue hearof to enacte, constitute, and frame such just & equall lawes, ordinances, acts, constitutions, & offices, from time to time, as shall be thought most meete & convenient for y^e^ generall good of y^e^ colonie, unto which we promise all due submission and obedience. In

[1] Bradford's *History of Plymouth Plantation*, the 2. Booke.

witnes wherof we have hereunder subscribed our names at Cap-Codd y^e^ 11. of November, in y^e^ year of y^e^ raigne of our soveraigne lord, King James, of England, France, & Ireland y^e^ eighteenth, and of Scotland y^e^ fiftie fourth. An^o^: Dom. 1620."

The theory of the social compact was not exhausted by this first experiment, but was taken up by Hugo Grotius in his work, "De Jure Belli et Pacis," which appeared in 1625. He declares that the mother of Natural Law is human Nature itself, and the mother of Civil Law is that very obligation which arises from consent, which deriving its force from the Law of Nature, Nature may be called, as it were, the Great Grandmother of this Law also. Grotius, while inclining to absolute monarchy, says that the questions, in what persons or bodies sovereignty resides, how it is limited and divided, and whether there exists a right to resist and make war upon the sovereign, depend upon the intention of the parties to the contract. But although he founds his political system on the social compact, he dwells upon the theory but little, and it occupies only a very small part of his book. The same thing is true of Milton, who, in his essay entitled "The Tenure of Kings and Magistrates," and written in 1649, in justification of the execution of

Charles I., traces the outlines of the principles afterwards so fully developed by Locke.

In 1651 the social compact received a new and unexpected turn from the powerful intelligence of Hobbes "the skeptic." This remarkable man wrote during the Commonwealth, and the aversion inspired by some of his religious views was increased to horror by his political theories; for he was an admirer of absolute monarchy, and, strange to say, he made use of the social compact to support his doctrine of the unlimited power of the king. Hobbes appears to have been the first person who really understood the difference between law and morality, and who saw clearly that moral duties do not in themselves impose legal obligations, or confer legal rights. In the "Leviathan" he lays down a series of laws of nature, which he derives from the desire for self-preservation and from the principle that each man ought to be willing in his own interest to strive for peace, and for that end to lay aside part of his natural freedom, and be content "with so much liberty against other men, as he would allow other men against himselfe." Thus he starts from a purely self-regarding basis, and yet brings his precepts up to the standard of the golden rule. The laws of nature, he says, are binding only on the con-

science of the individual, and he distinguishes them carefully from laws, properly so called, which are "the word of him that by right hath command over others;" a doctrine more elaborately expounded by Austin in his masterly work on jurisprudence. From one of his laws of nature Hobbes draws a conclusion which is sufficiently odd to deserve special notice. He says that where one is trusted to judge between man and man, it is a precept of the law of nature that he judge equally between them. "And from this," he continues, "followeth another law, that such things as cannot be divided, be enjoyed in common," or if they can neither be divided nor enjoyed in common, that the entire right be determined by lot. The lot may be arbitrary or natural, and among natural lots he classes primogeniture. Such an explanation of the law of primogeniture is almost as ingenious as the one given in "Iolanthe," where the inheritance is likened to a Derby Cup, a sort of racing-prize won by the first-born.

Treating first of the state of nature where "men live without a common power to keep them all in awe," —

> "Hobbes clearly proves that every creature
> Lives in a state of war by nature," —

a war in which there is no law, and conse-

quently no injustice; in which each man, being bound only by the duty of self-preservation, is at liberty to make use of everything for that end, and in which, therefore, each man has a right to everything. It is to get themselves "out from that miserable condition of warre," he tells us, "that men, who naturally love liberty, are willing to put a restraint upon themselves and live in commonwealths. A man, he adds, may renounce or transfer any portion of his liberty or rights, and when he has done so he is bound not to hinder those to whom he has granted a right from enjoying the benefits of it. Any such hindrance, indeed, would be an injustice. In this way Hobbes founds all justice and law on the transfer of rights, and on that mutual transfer of rights which he calls contract. Having thus laid his foundations by a careful course of reasoning, he declares that a commonwealth is "made by covenant of every man with every man, in such manner, as if every man should say to every man, 'I authorize and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner.' This done, the multitude so united in one person is called a 'Commonwealth,' in Latin *civitas*. This is the generation of that great 'Levia-

than,' or rather (to speak more reverently) of that 'mortal god,' to which we owe, under the 'immortal God,' our peace and defense."

Such a description of the institution of a commonwealth by a common contract to invest the sovereign with what may be called a universal power of attorney seems innocent enough, but Hobbes ingeniously draws from it some very startling conclusions. In the first place, the contract cannot be set aside without the consent of every one of the contracting parties; and certain rights having been transferred to the sovereign, they cannot be withdrawn from him without his own consent. In the second place, the power conferred upon the sovereign cannot be limited by any condition or covenant in favor of the subject, because the whole community cannot be a party to such a covenant, since there is no community until the contract instituting the sovereign has been made; and if the sovereign make any such covenant with individuals it is of no avail, because every breach of the covenant is the act of each of those individuals done by the sovereign as their agent. From the same principle it follows that the sovereign cannot wrong his subjects or be punished by them, for each of his acts is the act of his subjects themselves. In short, the sovereign must in all cases be absolute, and his rights are incapable of limitation.

Hobbes, like all writers of his time, divides governments into monarchies, aristocracies, and democracies; and while it does not strictly follow from his premises, he denies the possibility of a mixed form. It is perhaps unnecessary to add that he regards the government of England as an absolute monarchy.

Now although the apologists of absolute monarchy were not wanting in those days, the doctrines of Hobbes were not generally adopted by them, but the theory of the social compact became after his time almost the exclusive property of the writers who maintained the rights of the people. No doubt the personal unpopularity of Hobbes contributed in no small degree to this result, for his religious views, exaggerated as they were by public report, rendered his name so detested as to throw discredit on his political theories. This was true to such an extent that in 1683 the University of Oxford, in an attempt to uphold Charles II. in his struggle for absolute power, specially condemned certain of the political doctrines of Hobbes, together with those of Milton, Baxter, and other writers of republican tendencies. But the chief reason that the doctrine of divine right became the weapon of the monarchy, while the theory of the social compact was monopolized by the more democratic school, is to be found in the

nature of that theory itself, and of the times in which it prevailed. There was nothing improbable in the claim of a divine origin for the established order of things, but it was not reasonable to suppose that popular government, which had been almost unknown since the foundation of Christianity, was under special divine protection. If, on the other hand, the origin and legality of government could be traced to the consent of the people, it was hardly credible that the people would have so tied their own hands as to be unable to remedy abuses in the system they had instituted; and it was only natural that the people should interpret the original contract according to their present needs. It is evident, moreover, that a theory which magnified the importance of the people in the institution of the state, and made light of that of the king, was certain to be popular with the multitude, and to be received with little favor at court.

One of the most celebrated writers of the popular school was the unfortunate Algernon Sidney, to whose pen Massachusetts owes her motto. Sidney was accused of connection with the Rye House Plot, and at his trial the manuscript of his "Discourses on Government" was produced to prove his political sentiments, and became, in fact, the cause of his death. These

"Discourses" were composed as an answer to the "Patriarcha," a highly monarchical book, written by Sir Robert Filmer; but although they found all government upon consent, the social compact is very far from being a prominent feature in them.

The theory, or at least that part of it which affirms that there is a contract between the king and his people, came in very conveniently at the time of the English Revolution; not, indeed, as a motive for depriving James II. of his throne, but rather as a plausible justification for an act which the nation had determined to commit. The social compact helped to save the country at that time from a very great embarrassment; for the people were not yet worked up to the point of deposing the king, and if it had not been for this theory, and for James's disinterestedness in taking himself out of the way at the right time, it is not clear how the English would ever have got rid of him. As it happened, however, the Convention was able to adopt the following resolution: "That King James the Second, having endeavoured to subvert the Constitution of the Kingdom, by breaking the original Contract between King and People, and having, by the advice of Jesuits, and other wicked persons, violated the fundamental Laws, and withdrawn himself out of this

Kingdom, has abdicated the Government, and that the throne is thereby vacant."

It was only about two years after James II. had lost his crown in this complicated way, that John Locke, the philosopher, published his "Treatises on Government," which, like Sidney's "Discourses," were written as an answer to Filmer's book, again brought into prominence by the utterances of the Jacobite divines. These "Treatises" are deeply imbued with the spirit of the common law, and may be said to have been the standard of Whig principles for a hundred years. Locke begins with the proposition — the only one common to all the writers on the social compact — that in a state of nature all men are equal, but, unlike Hobbes, he is of opinion that the law of nature has a binding force before the institution of civil societies. He declares that no one ought to injure another in his health, liberty, or possessions; and that inasmuch as in a state of nature no one has any superiority or jurisdiction over any one else, the execution of the law of nature is put into every man's hands, so that every one has a right to punish the transgressors of that law. In addition to this right, which belongs to every one, a person injured has a special right to exact reparation from the offender. Locke derives the right of property

in the state of nature from the appropriation of such things as before lay in common, by bestowing labor upon them; and as examples of this he mentions the gathering of apples from the trees, the killing of deer in the chase, and the tilling and planting of land. According to Locke, therefore, the law of nature invests a man with all the rights of person and property; and hence it can be no desire to acquire legal rights that drives men into political societies, but a determination to protect and secure those already in existence, and avoid that state of war which, although not a necessary condition of the state of nature, is a condition likely to arise from the absence of a common judge. A political society is formed, he says, when a number of men agree to give up to that society their individual right of punishing offenders, and of exacting by their own force redress for injuries. In so doing they consent that the majority (unless there is a stipulation for a larger proportion) shall have power to make and execute laws necessary to accomplish the purposes for which the society is formed, and shall have authority to call upon each man to employ his force to carry out the judgments of the society.

In the course of his argument Locke takes occasion to make a very clever hit at the doc-

trine of divine right held by the Stuarts; for he declares that the difference between a state of nature and a state of civil society consists in the fact that in the latter there is a known authority, to which every man may appeal; and he adds, that any one who is not subjected to such an authority is not in a state of civil society. He then draws the conclusion that an absolute prince is in a state of nature with regard to his subjects. By becoming absolute, a prince forfeits all lawful authority over his subjects, and ceases to be a prince at all. The course of a monarch who aspires to be absolute resembles, in Locke's opinion, one of those games of chance, in which the player progresses until a throw of the dice brings him upon a number marked with a ditch or other device, when he is cast entirely out of the game, and must begin again at the very beginning.

Locke goes on to discuss the position of the descendants of the original members of the society, and in this matter he is more logical than the other writers upon the subject; for, basing the society upon the consent of the individuals who compose it, he boldly proclaims that no man can bind his children beyond the period of their infancy, and that as each child comes of age he is free to sever his connection with the society, or to declare himself irrevo-

cably a member of it. Even without such a declaration, a person who takes possession of property within the commonwealth, or who resides within its limits, consents to become a member of the society so long as the enjoyment or residence continues; but he may at any time dispose of his property, leave the commonwealth, and attach himself to another community.

After the State is created, the majority have power to determine the form of government; and this may be a democracy, an oligarchy, or a monarchy, according to the character of the body to which the power of making laws is intrusted. When once established the legislature cannot be deprived of its power by the people, unless it acts contrary to its trust, or until it has reached the limits set for its continuance; but if the legislature has put the executive power into other hands, it may resume that power at its pleasure, and punish for maladministration of the laws.

The subject, however, that interests us the most is to be found in the chapter which treats "Of the Extent of the Legislative Power;" for, in Locke's opinion, the authority of the legislature is not absolute, but limited by the object for which men entered into society. He declares that the legislature cannot be "abso-

lutely arbitrary over the lives and fortunes of the people," and that it "cannot assume to itself a power to rule by extemporary, arbitrary decrees; but is bound to dispense justice, and to decide the rights of the subject, by promulgated, standing laws, and known authorized judges;" because it was precisely a desire to avoid the inconveniences of having no fixed laws and no certain judge that induced men to form a political union. On the same ground he holds that the "supreme power cannot take from any man part of his property without his own consent: for the preservation of property" is "the end of government; and that for which men enter into society."

Locke proceeds to consider the effect of acts of the executive and of the legislature done in excess of their authority, and in a chapter devoted to the subject of tyranny lays down the general proposition that "whosoever in authority exceeds the power given him by the law, and makes use of the force he has under his command, to compass that upon the subject which the law allows not, ceases in that to be a magistrate; and acting without authority, may be opposed as any other man who by force invades the right of another." In his concluding chapter on the "Dissolution of Government," he carries the same idea still further, and finds

two internal causes of dissolution. The first of these is presented when the legislature is altered; and this happens when any single person sets up his own will in place of the laws, hinders the meeting of the legislature, or changes the mode of election without the consent of the people. In this and in all other cases where the existing government is dissolved, the people are at liberty to provide for themselves a new one. The other cause of dissolution occurs when the legislators or the prince act contrary to their trust; and the former act "against the trust reposed in them, when they endeavour to invade the property of the subject, and to make themselves, or any part of the community, masters, or arbitrary disposers of the lives, liberties, or fortunes of the people." "Whenever the legislators endeavour to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge, which God hath provided for all men, against force and violence."

In reading Locke we cannot fail to be struck with the resemblance between some of his deductions and the doctrines of our own jurists; and we might almost suppose that the "Trea-

tises on Government" were intended to be a commentary on the principles of American Constitutional Law. For, in fact, the idea that a statute which conflicts with the constitution is invalid and has no legal effect was by no means a pure invention on the part of Chief Justice Marshall, as has often been supposed, but is a very natural development of certain principles of the English common law.

In the seventeenth century England went through a period of intense political excitement which culminated in the expulsion of James II., and during this time political thought was very philosophical, and busied itself with inquiries about the nature and origin of government. But when the excitement subsided in the reigns of William and of Anne, and was finally extinguished under the House of Hanover, political thought adapted itself to circumstances, and, putting off the speculative, assumed a positive form. It is for this reason that the theory of the social compact rapidly lost its prominence in England, and in the reigns of the Georges disappeared entirely from view. In France, on the contrary, the middle of the eighteenth century saw political thought enter on a course of active speculation, and in consequence the social compact reappeared with renewed force and in the old form, although,

chameleon-like, it had changed its color to suit its new surroundings. Montesquieu, the most profound political thinker of his day, makes, it is true, no use of the theory — a fact which illustrates his strong common sense. His shrewdness, indeed, is nowhere better shown than in his remarks upon Hobbes's notion that the state of nature was a state of war; for he wisely suggests that man in a wild condition, instead of living in a state of war, lived in a state of abject terror, and that on seeing a stranger his first impulse, far from being a passion to fight, was probably an uncontrollable desire to run away. Rousseau, on the contrary, reveled in the theory of the social compact. In it he thought he had discovered the key to liberty, and the lamp that was to dispel all ignorance and oppression from the world. He developed it in a style so attractive, and in a spirit so much in sympathy with the feelings that were beginning to spread over Europe, that his book by its popularity has eclipsed all other works upon the subject, and he is commonly supposed to have been the author of the theory. Rousseau's "Contrat Social" was first published in 1762, and just as Locke's "Treatises" are saturated with the principles of the common law, so the "Contrat Social" foreshadows the doctrines of the coming Revolu-

tion.[1] It is very evident to-day that France, so long accustomed to a concentrated and despotic government, could not suddenly acquire the habits of personal independence and liberty to which the Anglo-Saxon system of government owes its character. After clearing away the wreck of feudalism, which had become a mere obstruction in the path of progress, and introducing equality of civil rights, the French Revolution was destined to leave political power as concentrated and despotic as before, only substituting for the ancient king some assembly, directory, emperor, or at the very best some chance popular majority; and no one of these, however wise and just, however devoted to the welfare of the people, could fail to be an autocrat.

[1] The differences between Rousseau's teaching and the course of events in the French Revolution are more apparent than real. His one restriction, for example, on the power of the people is to be found in his doctrine that no law can be made which is not of general application; but this, of course, could not be applied in any country where the reverence for law was no greater than it was in France, and it was especially valueless in a country where so much legislation was in reality accomplished by the decrees of the magistrates. His theory that nothing can be enacted except directly by an assembly of the whole people may, perhaps, have contributed to the contempt with which the mob of Paris treated the national legislature, but was clearly inapplicable to a land of anything like the size of France. His admiration of the state of nature, and his belief that civilization had been rather a curse than a blessing, could not fail to have a disintegrating tendency among a people unused to self-government.

Assuming, like every other writer on the social compact, that all men are by nature free, and that civil society is an artificial contrivance, which requires for its legality the consent of every member, Rousseau inquires how a man can assent to such an arrangement without injuring himself or neglecting his own interests, and he proposes the following problem: To find a form of association which shall defend and protect with the whole power of the community the person and property of each member, and by which each person, uniting with all, nevertheless obeys only himself, and remains as free as he was before. This problem he solves by supposing a complete transfer of each member, with all his rights, to the society; because, he says, since each man gives himself entirely to the whole society, he gives himself to no individual, and the condition of all being the same, no one has any interest to render it burdensome for any one else. In another place he expresses his idea of the original contract by saying that each one of us puts himself and all his powers under the direction of the general will (*volonté générale*), and we receive again each member as an indivisible part of the whole. The idea of this general or common will which, as we shall see, is also the will of each individual, is the distinctive

part of Rousseau's theory and the keystone of his whole system.

Rousseau next treats of the sovereign, which is simply this same society as a whole considered in relation to its members; and in his opinion, it is contrary to the nature of the body politic that the sovereign should be able to impose upon himself a law which he cannot break, for it would be simply a case of an individual binding himself by a contract made only with himself. He adds later that as a citizen in obeying the law obeys only his own will, no question of a limit to legislative power can arise. No fundamental law of any kind, therefore, can be binding upon the body of the people; not even the social compact itself. A guarantee against the sovereign power is unnecessary, because the sovereign, being composed of all the members of the community, can never want to injure them as a whole, nor can it, he says, injure particular individuals. The sovereign, from the mere fact that he exists, is always what he should be. These last two propositions, although at first sight somewhat surprising, are deduced from the very nature of sovereignty itself, which is nothing else than the aforesaid general will. This general will, however, does not mean simply the common will of the members of the society, but is used in a more re-

stricted sense, and denotes the common will of those members only when applied to an abstract or general question affecting the whole community. When the common will is applied to an object of this sort, it is an act of sovereignty, and is called a law; but a determination upon any particular or personal matter cannot be an act of the general will, because in such a case there are two parties, the individual and the state, who have not a common interest and cannot have a common will. The will of the latter is not general with regard to the former, but is to him as the will of a stranger, and since it is only to the general will that the members of the society agree to submit themselves, a determination of this kind cannot be an act of sovereignty. Rousseau refuses, therefore, to consider as laws at all what we term special or private laws; at most they are decrees or acts of the magistrates which must follow the provisions of general laws. The question naturally presents itself, What is this general will, and who has power to declare it? To this Rousseau replies that it is the will of the members of the community, and that no one else has power to declare it; nor can it be delegated, because, although a man may say that his will is the same as that of another man at any particular moment, or on any specific

question, yet he cannot say that his will in the future, and on any questions that may hereafter arise, will always be the same as that of another person. It follows that the power of making laws can be delegated neither to a prince nor to a house of representatives, and, while laws may be prepared and discussed by them, they can be enacted only by all the members of the community, duly assembled for the purpose. For this reason Rousseau declares that the English, who boast of their liberty, in reality are not free.

Now it is all very well to talk of the general will, as if laws were voted unanimously, but every one knows that this is not the case; and to keep up his fiction that each person obeys only himself, and at the same time to give to the majority the power of legislation, Rousseau develops a most ingenious idea. He says that each man desires the fulfillment of the general will, and that, when a law is submitted to the people, the question put to each man is not strictly whether he approves of the law or not, but whether it is in accordance with the general will which he wishes to carry out. Each man gives his advice thereon, and if a man is in the minority it simply proves that he was mistaken about the general will; so that if by chance his opinion had prevailed, he would

have done what he did not want to do. A very comforting doctrine, no doubt, to sweeten a bitter pill.

Sovereignty being confined to the enactment of laws, it is evident that there must exist in the state subordinate authorities, charged with the duty of executing the laws, carrying on foreign relations, etc.; and, as these duties do not, in Rousseau's opinion, partake of the nature of sovereignty, he rejects the doctrine of the separation of executive, legislative, and judicial powers, as advanced by Montesquieu. He divides governments into monarchies, aristocracies, democracies, and mixed forms, according to the composition of the subordinate authorities. These are established by laws, but the selection of the persons to fill the various offices, being a particular and personal matter, is not an act of sovereignty, and must be accomplished by election, by lot, or by some other method fixed by law. The powers and rights of these authorities cannot rest upon contract, because the sovereignty cannot be alienated or limited, and hence the public officers, and even the form of the government, may be changed at any time by an exercise of the general will. The author of the "Contrat Social" is very decided on this point, and says that every assembly of the people ought to be

opened with these two questions: Is it the pleasure of the sovereign to continue the present form of government? Is it the pleasure of the people to leave in office the present incumbents? One can hardly imagine a greater encouragement to revolution, or a more effective manner of bringing all citizens to the polls.

Rousseau sees merits and faults in each form of government, and wisely concludes that the best one is not the same in every country, but varies with the climate, the extent of the territory, and the habits of the people.

The apostle of liberty makes a most surprising application of his views on absolute sovereignty, at the end of his book, when discussing the religious question. He thinks that there ought to be a state religion, which every one must accept on pain of banishment. He proposes to allow no further persecution on this ground, but adds that if any person, after having declared his belief in the state religion, behaves as if he did not believe in it, he ought to be punished with death, because he has committed the gravest of crimes: he has lied before the law. He enumerates the positive dogmas which this religion should contain, and among them is to be found the sacredness of the social compact. There is also a negative one,

the condemnation of intolerance, and on the strength of this he insists that whoever says there is no salvation outside of the church ought to be driven from the state. In this way, Rousseau would prevent religious intolerance by making persecution a state monopoly. Such must have been the motive of the governing board of a certain college in America, which was for many years accused of filling its vacancies exclusively with persons of one denomination, not with any sectarian purpose, but merely for fear that if a person of a different faith were admitted he would try to fill the board with members of his own church. I do not assert that the charge was true, but it was certainly somewhat amusing.

It is singular that among all the constitutions in which the revolutionary period in France was so prolific, there is no reference to the social compact; and it is even more strange that these documents treat of the matter of private rights rather from an English than a French point of view. A superficial observer, who should compare the Constitution of the 3d of September, 1791, with the Constitution of Massachusetts might well doubt which was the French and which the American production. The Frenchman solemnly condemns arbitrary punishment; proclaims the sacredness of pri-

vate property, insisting that it can never be taken except in case of public necessity, and then only upon due compensation; and declares that the legislature has no authority to pass a law violating any of the rights guaranteed by the Constitution; but yet it is not long before he votes to execute the king and to confiscate the property of the *émigrés*. The fact is that Rousseau sympathized with the political sentiments of France far more than the Abbé Siéyès and his fellow constitutional architects, while the French people were much more readily inspired by the theories of Rousseau than by the statesmanship of Mirabeau.

The great theory was not so neglected by the constitution-makers on this side of the ocean; for, as the first social compact known to history was made by the Pilgrim Fathers in the cabin of the Mayflower, so the most elaborate, if not the last, was made in part by the descendants of these same men, and entitled the Constitution of the Commonwealth of Massachusetts. Evidently this relapsing into a state of barbarism and recovering one's self by means of a social compact was a favorite pastime with the New Englanders.

The second and third clauses of the preamble of the Constitution run thus: —

"The body politic is formed by a voluntary

association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them; that every man may, at all times, find his security in them.

"We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new constitution of civil government, for ourselves and posterity; and devotedly imploring His direction in so interesting a design, do agree upon, ordain, and establish, the following *Declaration of Rights, and Frame of Government*, as the CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS."

Then follows the Declaration of Rights, in which it is impossible not to see the influence of Rousseau curiously combined with the prin-

ciples of the common law, of Magna Charta, and of the Bill of Rights; for although our ancestors were deeply imbued with ideas which found their theoretical expression in Locke's "Treatises on Government," their imagination was fired by the writings of the French philosophers. From Montesquieu they borrowed the doctrine of the separation of powers, which has become so thoroughly a part of the American political system, and in fact they accepted abstract theories as the basis of their political practice to a far greater extent than any other body of Anglo-Saxons has ever done before or since. This is evident even in the very wording of the Declaration of Rights which we are considering; for when an assembly wishes to declare the existence of a right which is not dependent upon its own action, it naturally uses the present tense, thus, "Every man has a right;" but if, on the other hand, the assembly wishes to create a right, it uses what I may call the future imperative, and says, "Every man shall have a right." The first of these forms is appropriate in making a statement, while the second is the language of command. Now it is worthy of remark that the French legislators usually employ the former expression, while the Anglo-Saxon, both in statutes and constitutions, make use almost invariably of the lat-

ter. The Massachusetts Declaration of Rights, however, proclaims these rights in the present tense, with an occasional relapse into the future, especially when treating of matters of detail.

The Constitution of Massachusetts was not the last nor the most extraordinary application of the social compact in this country, for the rage for crude theory at one time attacked the bench, and grave judges were heard to say that a statute was invalid if repugnant to the principles of justice and civil liberty. Even Judge Story was carried away by this idea, and used very loose language on the subject; though he never went quite so far as Chief Justice Hosmer of Connecticut, who said, in one case,[1] "With those judges, who assert the omnipotence of the legislature, in all cases, where the Constitution has not interposed an explicit restraint, I cannot agree. Should there exist, what I know is not only an incredible supposition, but a most remote improbability, a case of the direct infraction of vested rights, too palpable to be questioned, and too unjust to admit of vindication, I could not avoid considering it as a violation of the social compact, and within the control of the judiciary." At first sight this appears to be merely a ridiculous

[1] Goshen *v.* Stonington, 4 Conn. Rep. 209, at 225. See also the cases collected in Cooley on Constitutional Limitations, 164 *et seq.*

attempt to engraft a new doctrine upon the common law, but however absurd the attempt may have been, it was in reality a logical deduction from the teachings of John Locke, and was not so unprecedented as one might suppose. It was, indeed, long doubtful in England whether the courts had not authority to disregard an act of Parliament, if they considered it against natural equity or common right and reason, because, in the words of Hobart, "*jura naturæ sunt immutabilia*, and they are *leges legum*." Such a power was frequently claimed by the judges,[1] and in one case,[2] at least, Lord Coke actually refused to apply an act of Parliament, on the ground that it made a man a judge in his own case. Although the claim was abandoned by the judges early in the last century, yet the doctrine that the legislature must respect private rights, and that no one ought to be deprived of his property without compensation, remained a cardinal principle of English legislation until within the last few years. This principle is protected in America by the various constitutions, and it has been settled that the courts have power to disregard

[1] See Doctor and Student, c. vi. ; Day *v.* Savadge, Hobart, 85, at 87 ; Calvin's Case, 7 Rep. 1, at 13 b and 14 a ; City of London *v.* Wood, 12 Mod. 669, at 687.

[2] Bonham's Case, 8 Rep. 114 a.

a statute only when it conflicts with some provision in these instruments. Hosmer's theory has been entirely exploded, and the spectre of a social compact has long ceased to disturb the quiet labors of the bench.[1]

I have so far made no reference to the German writers, not because they do not deal with the social compact, for after the middle of the seventeenth century almost all of them devoutly believed in it. In fact, they entirely adopted and Germanized it, or, as some malicious critic might say, in the words of Sheridan, they treated it as gypsies do stolen children, — disfigured it to make it pass for their own. There are two reasons why I have not mentioned the German writers before. The first is the lack of space in this sketch to touch upon any one but Kant, the most famous of them all, and his writings are later than those we have so far considered. A second reason is the existence of certain peculiarities of thought characteristic of the Germans, which are not to be found among the really great writers of other races, and which may be in some measure explained by the political condition of the German people. The most marked of the peculiarities to which I refer is a tendency to confuse morality

[1] That this doctrine has not yet completely lost its hold on the public is proved by the correspondence in *The Nation* last winter.

and law. This may be said to be a universal failing with the German publicists, and it is this, more than anything else, that makes their writings so difficult to read, and so unsatisfactory when read. Another peculiarity, which, although not so general, is nevertheless very common with the Germans, is the attempt to combine in the same political system certain inviolable natural rights of individual citizens with an unlimited authority on the part of the sovereign. Hobbes and Rousseau, while differing so much in their views, agree in attributing absolute authority to the sovereign power in the state, and declare that the rights of the subject are created by and are dependent upon its will. Locke and our own forefathers, on the contrary, start with certain natural legal rights possessed by the citizens as individuals, limit the authority of the sovereign power accordingly, and maintain that any attempt on its part to violate these rights is itself unlawful. But the Germans, in trying to reconcile the unlimited power of the state with the inviolable rights of the citizens, only puzzle themselves afresh with the old conundrum, — what would happen if an irresistible force should meet an immovable obstacle?

I have said that these peculiarities of thought can be explained to some extent by the condi-

tion of the German race. The people had been so long unaccustomed to taking any part in the discussion of political affairs, and were so unused to transacting public business on juries, etc., that, with a type of mind naturally metaphysical, they very easily fell into an excessively abstract and theoretical, as distinguished from a positive and practical, way of looking at political problems. It was but natural that the German philosopher should not clearly separate the study of law as it is from the study of law as it should be, and this is but a step from the confusion of law and morality. It was inevitable that he should fail to appreciate the bearing of public policy on legal questions, and should strive to found his legal system on *à priori* reasoning; that, to adopt an expression of Judge Holmes,[1] we should find a characteristic yearning in the German mind for an internal juristic necessity for law. The introduction of the Roman law probably contributed in some degree to these results; for it is to be observed that this law did not come to the Germans as it did to the Romans, in the form of a slow growth, but was received as a complete system, and was accepted, not on account of the veneration which is derived from long habit and association, but because the German

[1] Holmes on the Common Law, page 207.

jurists were struck by the inherent justice of its principles. A person who confuses the positive law with law as it should be, is easily led to confuse the rights which the subject ought to have with those rights which he actually possesses; and we are not much surprised to find such a person asserting at one moment that the subject has certain inviolable natural rights, and at another that the authority of the sovereign is unlimited. It is to be remembered also that the Germans, like all Teutons, had a highly developed sense of individuality, although during the period of which we are speaking they lived under autocratic governments; and we see in their writings an almost pathetic longing for personal independence coupled with an unconquerable respect for the established authorities.

Kant was, perhaps, the most German of the Germans, and in his writings the qualities to which I have referred may be found very fully developed. He published his first political treatise in 1793, at the age of sixty-nine, as one of a series of essays upon the proverb, "That may be all very well in theory, but it will not work in practice." The humor of discussing the social compact under such a title was unfortunately lost upon the author, who attempted to show that, although such a compact could not be looked upon as an actual fact, yet as a theory

it was the basis of certain political principles which ought to be acted upon in practice. The only other work of much importance in which he discusses the subject is his "Metaphysical Principles of the Theory of Law," published in 1796, and deeply influenced by the writings of Rousseau.

Kant begins his first treatise with the remark that the contract by means of which a commonwealth is formed differs from all other contracts of association in this: that while the latter are made for various purposes, the former is the only one which is its own object. The object of the social compact is not the promotion of the happiness of the contracting parties, but merely the institution of a commonwealth; that is, the creation of a condition of things in which the members are possessed of legal rights, and he defines right, in his own lucid way, as the limitation of the freedom of each man on the condition that it is consistent with the freedom of every other man, as far as this is possible according to universal laws. The foundations upon which alone a commonwealth can be erected in accordance with the pure rational principles of human rights are the liberty, equality, and self-sufficiency of its members. The last of these I shall explain later, but the others require immediate attention.

The purpose for which a commonwealth is instituted being merely the creation of the rights of its members, and not the direct promotion of their happiness, no man can be compelled to be happy in any particular manner, but each man has a right to pursue his own happiness in the way he thinks best, so long as he does not interfere with the right of every other man to do likewise in accordance with the universal law. This is that liberty to which every member of the community is entitled as a man, and any attempt on the part of the government to treat its subjects as children, and regulate their happiness, is the worst possible despotism.

The equality of the members of the community follows naturally as a corollary from their liberty, and may be expressed by saying that each man has the same rights against every other man, the sovereign only excepted, that every other man has against him. Such an equality is not inconsistent with the greatest difference in property, and even in rank; for it is not necessary that the actual rights of every man should be the same, but only that there should be no legal barrier to prevent any man from acquiring the property and rights, or rising to the position, enjoyed by another member of the community. Kant declares, accordingly, that rank and privilege cannot be hereditary,

but must be open to every person who, by his talent, diligence, and good fortune, is capable of attaining to them.

Now one would naturally suppose, after such a discussion, that Kant regarded the right to liberty and equality as in reality a right, and that in his opinion an act of the sovereign which violated this right would be unlawful, and might be resisted by the subject. But so far we have been considering only the immovable, without taking account of the irresistible, and in this case it is the latter which carries the day. For although Kant appears to base his system upon an original contract, and, starting from the premise that it is only to himself that a man can do no wrong, declares that no one can have power to legislate for a community except by virtue of a fundamental law resting on the universal will of the people, so that even the right of the majority to bind the minority can derive its force only from an original contract agreed to by every one, yet he regards the social compact not as the actual foundation of law, but merely as a theory, giving rise to certain principles to which laws ought to conform. He goes so far as to condemn the notion that any social contract was actually made, on the ground that such a doctrine encourages the idea of popular sover-

eignty, and gives rise to insurrection and rebellion; and while in one place he argues strongly in favor of the right of free speech, he tells us in another that, for practical purposes, the origin of the supreme power is unsearchable by the people who are subjected to it, and that to throw doubt upon it is a crime.

Kant does not, however, look on the social compact as a mere idle theory, and the object of one of his treatises appears to be to show its practical importance; not, indeed, in establishing rights, but in furnishing a rule by which to test the rectitude of laws. He states the test in this way: If a law is so made that it is impossible that a whole people should give its assent to it (a law conferring hereditary privileges, for example), then the law is not just;[1] but if such an assent is merely possible, then the law must be considered just. But this test is useful only as a guide to the lawgiver, and is not to be applied by the subjects, whose duty it is in all cases to obey. If the sovereign departs from the test, and even if he violates the original contract, the subjects are not justified

[1] It is impossible to render correctly the German word *gerecht*, which does not distinctly imply whether the act in question is right from a legal or from a moral point of view. No doubt the absence of words clearly distinguishing between moral and legal right is partly caused by, and has helped to aggravate, the confusion of the Germans upon this subject.

in resisting him; because, the sovereign being by definition supreme in the state, there can be no higher power to decide controversies between him and his subjects, or to enforce the rights of the latter. It is only by submission to his universal lawgiving will that a condition in which legal rights exist is possible at all, and to resist the sovereign is to bring about a state of things where all right ceases, or at least where it can no longer have any effect, and this is in the highest degree unlawful.

If such assertions as these, Kant says, draw upon him the reproach of flattering monarchs to excess, he hopes that he may be spared the accusation of too much favoring the people when he maintains, in opposition to Hobbes, that they retain certain indestructible rights against the sovereign; and he stigmatizes as horrible Hobbes's doctrine that the sovereign can do no injustice to the subject. But a closer investigation shows that his own views do not differ very much from those which he abhors, except that he objects to calling a spade a spade, and Hobbes does not; for these indestructible rights — which, by the way, only entitle the subject to express his opinion in public affairs and to make a statement of his grievances — are not enforceable (*zwangsrecht*), and depend for their exercise entirely on the good will of the sovereign.

Kant discusses at some length the rightful form of government, meaning by that, not the form which alone can rightfully command the obedience of its subjects, but only the form of a government constructed according to the pure principles of right, and serving as a model which all others ought gradually to be made to resemble. He accepts the principle of the separation of the legislative, executive, and judicial powers, and claims that the first belongs exclusively to the people or their representatives. It is in this connection that the curious doctrine of the self-sufficiency of the citizen, to which I have already referred, becomes of importance, for, in Kant's opinion, all the citizens are not capable of taking part in legislation, but only those who are self-supporting and therefore independent; and in this category he does not mean to include all persons who are supported by their own exertions, but distinguishes between those who give their labor for hire and those who bestow their labor upon articles which they afterwards sell, —the former having no right to vote, while the latter are in the fullest sense citizens. The separation of powers does not afford, it appears, a sufficient security to the citizen, and another strange conclusion is drawn from the fundamental axiom that it is only to himself that a

man can do no wrong. Any person who is set to judge may do an injustice, and the people ought, therefore, to judge themselves by a jury taken from among them, which decides all matters of fact and leaves to the court the questions of law. This is a strange application of Rousseau's fiction that every one in the state is governed only by laws of his own making.

When Kant proceeds to discuss the criminal law, the characteristic yearning of the German mind seizes him with great violence, and, rejecting indignantly all motives of expediency, he seeks an internal juristic necessity drawn from the nature of the crime itself. He finds it in the principle of equality, that one ought to incline no more to one side than to another, and says that whatever wrong you have done to another you must do to yourself. It would take too long to explain how, from this doctrine of an eye for an eye and a tooth for a tooth, he deduces the fact that imprisonment is the appropriate punishment for theft, but it is obvious that death is the proper retribution for murder. So severe is he in the application of this intrinsic justice that he considers it a crime to allow a murderer to live, and declares that if a community determines, with the consent of every member, to break up and disperse, the last murderer in prison must be executed be-

fore they do so, in order that the guilt of violating justice may not fall upon the people. A friend of mine has suggested that if this principle were so extended as to keep the community together until all the lesser criminals in jail had served out their sentences, it would probably have the desirable effect of preventing the community from breaking up at all.

The theory of the social compact appears to have had a peculiar fascination for the German mind, for it was taken up by Kant's successors, and it is only quite recently that it has been finally abandoned by them.

We have traced the history of this extraordinary theory from the time of its first appearance at the end of the sixteenth century, and we have seen it used to support the most divergent doctrines and the most conflicting opinions; for, like certain ingenious Yankee inventions, it was capable of being applied to almost any service, although really adapted to none. No better example can be found of the fact so strongly urged by Lecky that men are chiefly persuaded, not by the logical force of arguments, but by the disposition with which they view them. We have seen the theory started by a zealous churchman to uphold his church. We have seen it wielded by Hobbes in favor of absolute monarchy in England. We have

then seen it taken up by Locke as a shield to individual right, and in defense of a limitation of the power of government; and later still by Rousseau, as an argument for an unbridled democracy. We have seen its working here on the Constitution of Massachusetts; and after lighting the world for two centuries, we have seen it give a last despairing flicker in the courts of the United States, and fade away in the dim light of German metaphysics. It now remains for us to mark the causes of its rise and fall.

To the Greeks and to those of the Romans who looked at jurisprudence from a philosophic point of view, law was merely a department of morals; and this explains the absence among the ancients of any systematic attempt to discover a special basis for the obligation of legal duties.[1] When the Teutonic race, on the other hand, first appeared on the borders of the Roman Empire, it was still in that early stage of civilization in which the rightfulness of existing institutions is assumed without question; in which it is enough that no one remembers a time when things were otherwise, and custom undisputed has the force of law. Under these circumstances legislation is unknown, and the

[1] In Plato's *Republic*, Book II., there is a reference to a crude notion of an original compact.

slow change which takes place in the laws is brought about through the administration of justice, and the exercise of those powers which we should class to-day among the executive functions of government. As political needs developed during the course of the Middle Ages, and were better understood, the idea of legislation as something distinct from administration, and as an intentional change in the existing law, begins to appear, but the form which it assumes is characteristic of the political views of the day. The lawyers, deriving their ideas from the writings of the Roman jurists, asserted at quite an early period that the king was the source of all legislative power; but underlying this doctrine, and constantly cropping up, we find the principle that any change in the law requires the consent of those whom it concerns. Such a claim was almost universal in the matter of taxation, and even on questions of general legislation it was constantly recurring when a change was clearly seen to affect anything more than the mere administration of the law. Now it must be remembered that in feudal times little or no distinction was made between public and private rights. All rights, beginning with that of the king to demand from his vassal an aid to ransom him from captivity, and including that of the smallest land-

owner to exact a heriot on the death of his tenant, were looked upon as private property. Under these circumstances it is not strange that an innovation in the law was thought to require the consent of those whose property was to be affected by it, whether it were the grant of a "free aid," or a change in the established custom of the realm, and this idea found its most complete expression in the famous saying of Edward I.: "That which toucheth all shall be allowed of all." The conceptions of the Middle Ages upon this subject, therefore, were not of a character to excite political speculation, because the rightfulness of all property was assumed without question, and of course there could be no doubt of the right of every man to dispose of his own. But when the Renaissance gave a new impulse to thought, and men began to distinguish more accurately between public authority and private right, it was unavoidable that they should investigate the rightfulness of that authority, and inquire into the origin of property. The question, then, presented itself: Whence has a government a right to compel a man to act against his will, and what gives the binding force to law? There was one obvious way to answer the question, and that was to ascribe a divine origin to government; but this view of the matter, for

reasons which I have already explained, became monopolized by one school of political thinkers, and consequently discredited among those who did not agree with their tenets. One other solution of the difficulty suggested itself, and that was the consent of the person interested; for clearly a man cannot be wronged by an act to which he has freely consented, and what easier than to suppose a universal compact, made at some remote period, by which every one consented to the institution of a government, and agreed to be bound by the laws enacted by it? Such a compact appeared to many men the only way of accounting for the rightfulness of government, and its existence was assumed without hesitation; for, anarchists being few in those times, every one was constrained to allow the lawfulness of some government or other, and when belief is indispensable it is easy to believe.

In this way the theory of the social compact met with a very general acceptance, and yet it contained within itself the seeds of its own destruction, because, if the theory were logically carried out, each man, when he came of age, ought to have a right, as Locke maintained, to sever his connection with the body politic and declare his freedom from its laws; but such a doctrine, greatly impairing, as it must, the

effect of the theory, and giving a constant encouragement to lawlessness, could not be admitted for a moment. The theory, moreover, rested on the assumption that a contract is intrinsically binding in a state of nature when other rights do not exist; but such an assumption, although plausible, is clearly seen to be false by any one who will take pains to think about it. Spinoza and Leibnitz pointed this out in the earlier days of the discussion, but the tide was too strong to be stemmed at that time. As a matter of history, indeed, it is well known to students of the early forms of law that the right to compel the performance of a contract is not developed until long after the right to property is well established. But undoubtedly the chief causes of the decline of the theory were the change in the general tone of thought from speculative to positive, and the complete absurdity of such a compact from an historical point of view, — an absurdity which became more evident as a knowledge of semi-barbarous races became more extensive. It may well be doubted whether any one ever believed that an actual compact of this kind was made by people in a state of nature. Imagine a crowd of half-naked savages grouped around an ancient oak, while an old chief under its boughs explains to them that they have

reached the point when it is advisable to form a civil body politic, and that it is proposed to agree, among other things, that when they become sufficiently civilized to understand the meaning of king, lords, and commons, and to appreciate the benefits of taxation, then the king shall not have power to levy any tax without the consent of the faithful commons. Imagine the savages clashing their spears and shields in token of universal approval, and breaking up with a further understanding that the sacredness of the social compact shall instantly be made an article of the state religion.

V.

THE LIMITS OF SOVEREIGNTY.

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

It is the only supreme power in our system of government. — Mr. JUSTICE MILLER, in United States *v.* Lee, 106 U. S. 196.

AMONG the theories of jurists there is, perhaps, none which has been a battle-ground for so long a time as that which relates to the limits of sovereign power. For two centuries and a half the writers who maintained that sovereignty is in its nature unlimited, and those who contended that man is endowed with certain natural rights which the state cannot legally invade, waged against each other a continual war; the former, in England, being found among the partisans of monarchy, the latter in the ranks of those who favored the popular cause. But now, just at the moment when democracy is carrying everything before it, and the advocates of the natural rights of man appear to have triumphed, there has come

a sudden change of base, and the victors, adopting the opinions of the vanquished, are almost universally convinced that the authority of the sovereign, from its very nature, can be subject to no limitation or restraint.

This change is far from accidental, and may be traced to two entirely distinct causes, of which one has acted with great force upon the mass of the community, while the other has produced an effect even more striking upon the minds of scholars. So long as the reins of government were in the hands of a king or an aristocracy, it was natural that the advocates of popular rights should seek to restrain his power; but after the people had obtained control of the state, it was not to be expected that they would show the same respect for principles which fettered the exercise of their own authority. The ascendency of the popular party had, therefore, an inevitable tendency to upset those doctrines which were designed to limit the exercise of power by others. Now it was during the period when democracy was beginning to assert its power, that Bentham's treatise on legislation,[1] and Austin's work on jurisprudence, at-

[1] Bentham, as will be seen in the following pages, far from teaching the doctrine that the power of the sovereign is unlimited, distinctly repudiated it, and yet there can be no doubt that his principles, by undermining the old notion of natural rights, materially helped to establish that doctrine.

tracted the serious attention of scholars: the first of these writers proclaiming the greatest happiness of the greatest number as the sole and final test of legislation; while the second developed, in a new form, the doctrine that sovereignty is essentially incapable of limitation, and by the clearness and force of his logic, obtained a mastery over the legal thought of English-speaking people, which has never been equaled in the history of the race. The despotic nature of absolute democracy has helped to make Austin's views upon sovereignty prevail; but this alone would not account for the force with which his theories have stamped themselves upon all subsequent legal speculation; and the many criticisms upon this work, however correct some of them may have been, have served to bring into brighter light the extraordinary power of his intellect.

At first sight, Austin's doctrine appears to involve merely an abstract question, or intellectual problem, which has no real bearing on actual government; but this is far from true, for although as understood by its author it is harmless, even if erroneous, yet when applied to politics, it is liable to be very much abused, and to become the source of evils which were by no means contemplated by him. In the first place, the doctrine that sovereign power is

unlimited leads almost unavoidably to the opinion that it is proper to use that power without restraint, because the great mass of the people cannot distinguish between the legal and moral aspects of politics, and are very apt to conclude that if the state has a legal right to do a certain act, it is under no moral obligation to refrain from doing it. There is a danger, in the second place, that the people will confound sovereignty with legislative power, and attribute the former to any body which possesses the latter. If they are taught that the power of the sovereign is absolute, they are likely to believe that the legislature ought to, and in fact does, have authority to pass laws without restraint, — a notion which would undermine the very foundations of our whole political system. It is for these reasons that the doctrine advanced by Austin is of real practical importance, and not a mere matter for intellectual speculation; but in considering the subject I shall assume the liberty, so rarely allowed at the present day, of treating the theory from a purely abstract stand-point, without inquiring in what body or bodies sovereignty is actually lodged in the United States, or whether those bodies (be they States severally, States in union, or people of the nation) are possessed of absolute power or not.

The writers of that great school which maintained the possibility of limitations upon the authority of government, based their theories upon what they styled the natural rights of man. Man, they said, is endowed by nature with certain legal rights which he cannot, or at least which he never did, surrender, and these rights, derived as they are from a higher source than civil government, cannot be abridged or destroyed by legislation. Such a tenet of man's natural rights was long accepted as an axiom by the great bulk of Englishmen, and it is due to Austin more than to any one else, with the possible exception of Bentham, that within the last half century the idea has fallen into discredit, and been abandoned by almost every scholar in England and America. Austin's teachings on this subject were not altogether original with him, but were derived from Hobbes, whose writings, except when occasionally mentioned with a shudder, slept unnoticed for two hundred years until brought into prominence again by his great disciple. Hobbes seems to have been the first man who understood the difference between legal and moral obligations; who saw that legal rights depend for their existence upon positive law, and that positive law is an artificial creation made by men. In this view he was followed by Austin,

who transformed the crude ideas of his master into a complete philosophical system.

Austin's definition of law may be briefly stated as follows: A law is a command, coupled with a sanction, given by a political superior or sovereign to a political inferior or subject. So far as statute law is concerned, this definition is undoubtedly correct, for a statute is clearly a command issued by the legislature; but the customary law presents at once a difficulty, and of this Austin says (Lecture I. p. 23, 2d ed.): —

"Now when judges transmute a custom into a legal rule (or make a legal rule not suggested by a custom), the legal rule which they establish is established by the sovereign legislature. A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at his disposition is merely delegated. The rules which he makes derive their legal force from authority given by the State: an authority which the State may confer expressly, but which it commonly imparts by way of acquiescence. For, since the State may reverse the rules which he makes, and yet permits him to enforce them by the power of the political community, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration.

. . . . . .

"Like other significations of desire, a command is express or tacit. If the desire be signified by *words* (written or spoken), the command is express. If the desire be signified by conduct (or by any signs of desire which are *not* words), the command is tacit."

"Now when customs are turned into legal rules by decisions of subject judges, the legal rules which emerge from the customs are *tacit* commands of the sovereign legislature. The State, which is able to abolish, permits its ministers to enforce them: and it, therefore, signifies its pleasure, by that its voluntary acquiescence, 'that they shall serve as a law to the governed.'"

The reasoning here presented rests, it will be noticed, entirely on the statement that the sovereign legislature has power to abolish the customary law; but this assertion, while very nearly accurate in the present state of political development, is by no means universally true. In most of the civilized countries of the world, perhaps in all of them, there exists to-day a legislative body which possesses such a power; but this has not always been the case, for it is well known to students of early forms of law that the legislative function develops much later than the administrative or the judicial, and that law attains a considerable degree of

perfection before a distinct idea of legislation makes its appearance. The practice of creating law shows itself at first modestly and timidly, and attempting to conceal its real nature, assumes the form of declaring existing rules or regulating the methods of procedure, and not that of deliberate innovation. For a long time custom is far more potent as a source of law than legislation, and it is only by very slow degrees that the latter acquires the predominance. A certain class of laws, indeed, those which relate to the fundamental institutions of government, were not drawn completely within the sphere of legislation until very recent times. Louis XIV. was the sole possessor of political power and absolute sovereign in France; but an attempt on his part to make Madame de Maintenon his successor on the throne would undoubtedly not have been considered by the bulk of his subjects as impairing his heir's right to the crown; and although in some countries the royal succession was deliberately altered, yet the power of changing the constitution of government cannot be said to have developed fully in modern Europe before the outbreak of the French Revolution. In the early stages of civilization the power of any man or body of men to interfere with customary law is extremely limited, and the persons by

whom justice is administered are not in fact, or in public estimation, the ministers of any legislative body, nor are they under its control. It is only by the purest of fictions that customary law under these circumstances can be said to exist by virtue of the will of such a body, or to be established by its commands.

It is clear, therefore, that Austin's definition of law, although nearly accurate at the present day, is incorrect when applied to primitive societies, or even to those which have reached a considerable degree of civilization. The definition, in short, is not true of law in general, and this is important when we come to consider the nature of sovereignty, because Austin's proof that sovereign power can have no limits is based entirely, as we shall see, upon the proposition that all law is the command of a political superior. If this proposition is not universally true, his proof, even if otherwise unimpeachable, will apply only to those states in which it can be shown as a fact that all law derives its force from such a command; and in these states it will not demonstrate that the power of the sovereign is incapable of limitation, but merely that it is not actually limited at the time when the fact in question is found to exist.

We now come to the great argument de-

signed to prove that sovereign power cannot be limited. It is as follows (Lect. VI. p. 225, 2d ed.) : —

"Every positive law, or every law simply and strictly so called, is set, directly or circuitously, by a sovereign person or body, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set, directly or circuitously, by a monarch or sovereign number, to a person or persons in a state of subjection to its author."

"Now, it follows from the essential difference of a positive law, and from the nature of sovereignty and independent political society, that the power of a monarch properly so called, or the power of a sovereign number in its collegiate and sovereign capacity, is incapable of *legal* limitation. A monarch or sovereign number, bound by a legal duty, were subject to a higher or superior sovereign : that is to say, a monarch or sovereign number bound by a legal duty, were sovereign and not sovereign. Supreme power limited by positive law is a flat contradiction in terms."

"Nor would a political society escape from legal despotism, although the power of the sovereign were bounded by legal restraints. The power of the superior sovereign immediately

imposing the restraints, or the power of some other sovereign superior to that superior, would still be absolutely free from the fetters of positive law. For unless the imagined restraints were ultimately imposed by a sovereign not in a state of subjection to a higher or superior sovereign, a series of sovereigns ascending to infinity would govern the imagined community. Which is impossible and absurd."

This argument depends for its force, as I have said, upon the proposition that all law is the command of a definite political superior, since it is based upon the assumption that legal restraints can be imposed only by means of such a command. Let us compare this passage with the one already quoted from Austin, in which he tries to prove that customary law derives its authority from a command of the sovereign. The argument there used is, shortly, as follows: The sovereign has power to abolish the customary law; by refraining from so doing he declares his pleasure that it shall continue in force; hence it owes its existence to an expression of his will, and may properly be said to result from his command. The whole of this reasoning rests upon the premise that the sovereign has power to abolish the customary law, and the truth of that premise might be demonstrated by either one of two methods. It

might, in the first place, be proved inductively; that is, by examining all known systems of law, and showing that in each of them the sovereign had the power claimed for him, — a result which would establish a probability more or less strong that the power in question was universal. Such an examination, however, not only fails to establish the premise in this case, but actually disproves it, because, as has been already pointed out, there are known systems of law in which the sovereign does not possess the power in question. The premise might, on the other hand, be proved deductively, that is, by showing that it followed as a logical conclusion from some other premise or proposition admitted to be sound. Now, the proposition that the power of the sovereign can have no limits will appear on a little reflection to be the only one available for this purpose, and, inasmuch as Austin makes no attempt to examine all known systems of law, it would seem at first sight that the process of thought in his mind involved a deductive reasoning from that proposition as a premise. But if we state the proof that customary law is the command of the sovereign in this form, and compare it with the proof that sovereign power can have no limit, we shall see at once a flaw in the logic. These arguments, taken together, are as fol-

lows: The power of the sovereign can have no limits; he has, therefore, power to abolish the customary law; hence, all law is the command of the sovereign; and from this it follows that his power can have no limits. The reasoning in a circle here is only too evident, and it is impossible that a man of Austin's logical acuteness should have been guilty of so palpable an error. The fact is that Austin simply assumed the power of the sovereign to abolish customary law. He did not attempt to prove it deductively, nor did he make an examination of all known systems of law, but his attention having been directed only to highly developed societies, he thought the proposition sufficiently obvious to be accepted without question. It is probable, however, that many of his readers have been misled into supposing the proposition established deductively, and that they have unconsciously gone through in their own minds the reasoning in a circle already described; a mistake which is the more natural because the two arguments are separated in Austin's book by two hundred pages, and one of them might easily be forgotten before the other was reached.

I have so far attacked Austin's demonstration that the power of the sovereign can have no limit, by trying to prove his premise that law is

a command untrue as a general proposition, and by showing that the process by which that premise is often supposed to be established involves a reasoning in a circle. But these do not exhaust all the possible objections to his position, and for the purpose of discussing his arguments further I shall leave out of sight the criticisms already made, and suppose the proposition that all law is the command of a definite political superior to have been satisfactorily proved. From this it follows that no law can exist except by virtue of such a command; but is it therefore true that every command of a political superior, or of the ultimate superior termed the sovereign, is a law? That is the point which Austin seeks to prove; because if there are, or may be, commands of this sort which are not laws; if, in other words, the sovereign is for any reason unable, by issuing a command, to make a law in accordance with his will; then his legislative power is limited by just the extent of that inability. Starting with the proposition which, for the purpose of this part of the discussion, I have admitted, Austin very properly draws the conclusion that a sovereign, being, by definition, subject to no political superior, cannot be bound by any commands issued by such a superior, and cannot, therefore, be bound by any laws, or be

subject to any legal restraints whatever. From this it is clear that no act of the sovereign can be a violation of any legal duty, or give rise to any legal claim against him, or render him liable to punishment. It is clear, in short, that he can do no legal wrong. It is also clear that no law can declare his commands invalid, or deprive them of any legal force they would otherwise possess; but it does not follow that all his acts are valid and effectual, or that all his commands are laws. These are two very different things, and the former by no means implies the latter, but may very well exist without it. The Queen of England, although not a sovereign in the sense in which we are using the word, is in fact free from legal restraint. She can do no legal wrong. She cannot be sued or prosecuted for any act which she may commit. But her commands are not laws, and this is not because her power of legislation is restrained by the orders of a political superior, but simply because she possesses no legislative power at all. Here, then, we have the case of a member of a political society enjoying absolute freedom from legal restraint, without any corresponding authority to make laws.

Let us take another illustration. It was at one time asserted by the English judges that Parliament had not unlimited power; that it

could not, for example, make a man a judge in his own case.[1] Now, suppose that this doctrine had prevailed, and that both the judges and the community at large had been universally in the habit of disregarding statutes which conflicted with the principle I have mentioned. It is evident that Parliament in such a case would possess only a limited power of legislation, and yet would be bound by no legal duties, and subject to no legal restraints. The act of the Parliament in passing a statute of this kind would not involve that body or its members in any liability to punishment, and, according to Austin's own definition, its act would not be a breach of any duty imposed by law, because no legal duty can exist without a sanction. The conduct of the legislature, in other words, would not be illegal, but simply ineffectual. Parliament, therefore, would be subject to no legal duty, and yet would possess only a limited authority. In such a case it is evident not only that Parliament would be guilty of no breach of a legal obligation, but also that the validity of its commands would not in any way be limited by the command of a political superior. The result we have imagined could, of course, be produced by means of a law, set by a political superior, which declared the objectionable

[1] See page 170.

statutes invalid; but Austin makes no attempt to prove that it could not also be brought about without the intervention of such a law, and, in the case supposed, it would be clear that neither the judges, nor any definite political superior, issued commands to this effect, and that the statutes were not disregarded, on the ground that they conflicted with any such commands. To assume that because the legislative power of the sovereign is not limited by law, it is therefore without limit, is to take for granted one of the very points to be proved, and a point, moreover, which is far from self-evident. It is like assuming that, because the soil of Great Britain is not bounded by that of any other country, it is unlimited in extent.

It will perhaps occur to some one that, if all law is the voluntary command of the sovereign and the expression of his will (a proposition which, for the purpose of this part of the discussion, I have admitted), then through a change of that will any part of the law may cease to operate, and any right, being but the creature of law, may be taken away. It may seem, in short, that the sovereign, merely by revoking his own commands, can bring about any conceivable variation in that vast net-work of rights and duties which forms the substance of the law. But this is not the case, because,

although it is true that a volition which can be exercised only in one way is no volition at all, and that law cannot be said to exist by the will of the sovereign if he has no real option in the matter, yet it is equally true that the power of willing need not be unlimited in order that an act may be voluntary. It is enough that there exists a choice, although that choice does not extend to an infinite variety of objects. In order that the act of the sovereign in making a law should be voluntary, it is only essential that he should have the option of making the law or not, or that he should have a choice between two or more possible laws. It is not necessary that he should be able to establish any conceivable combination of rights and duties. To maintain the contrary would be like asserting that my motions are not voluntary because I cannot bend my joints the wrong way, or that my house does not stand during my pleasure, because I cannot tear down the lower story and leave the upper ones undisturbed. Hence it is clear that even if all law is based upon the will of the sovereign, there may be combinations of rules which he cannot make, and it follows that there may be rights which he cannot take away; at least if we leave out of account his power to revoke all his commands at once, and introduce a general state of anarchy, — an act

which would be virtually equivalent to an abdication.

Up to this point we have been examining Austin's proof that the power of the sovereign can have no limit, and I have tried to show that the argument is based upon an erroneous premise, and that even if the premise were sound the conclusion would not follow. Let us now study his definition of a sovereign, and see what inferences can be drawn from it. "If a *determinate* human superior," he says (Lect. VI. p. 170, 2d ed.), "*not* in a habit of obedience to a like superior, receive *habitual* obedience from the *bulk* of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent." Suppose that the members of a society are in the habit of obeying all those commands issued by the sovereign which relate to a certain class of matters, but are at the same time in the habit of disobeying all his commands affecting another class of matters. Suppose, for example, that they are in the habit of obeying all commands relating to secular concerns, while in the habit of disregarding entirely all commands touching religion. In such a case it is absurd to say that there is no government, and that the condition of the society is one of mere anarchy;

but it is also impossible to hold that the legislative power of the sovereign is unlimited, because those of his commands which are disregarded by his subjects, and which he has no power to enforce, amount only to ineffectual expressions of desire on his part, and by a misuse of terms alone can be called laws, or be said to be included within the limits of his legislative power. Sovereignty depends upon the habitual obedience of the society, and it is hard to see how it can extend farther than the habit upon which it rests. If, therefore, the society is not in the habit of obeying commands which relate to certain matters, the sovereignty of the person who issues them does not cover those matters, and the commands in question are not laws. The case we have supposed is extremely unlikely to occur, because a sovereign who found that a certain class of his commands were habitually disobeyed would, in all probability, either desist from issuing them, or attempt to enforce them, and thereby provoke a conflict likely to result in his success or his overthrow. Let us take a less improbable case. Let us suppose that the commands of a sovereign which concern one class of affairs are habitually obeyed, but that he refrains from issuing any commands touching another class of affairs because he knows that they would certainly be

disobeyed. This case is evidently parallel to the last one, for, so long as the habit of obedience does not extend to commands dealing with certain matters, it can make no difference whether such commands are issued and disobeyed, or whether they are not issued for fear of disobedience. It would seem, therefore, that the limit of sovereign power depends upon the limit of habitual obedience; that every command of a political superior, or (if we reject the proposition that all laws are commands) every rule of conduct, which is obeyed by the bulk of a given society, is a law, provided it is coupled with a sanction appropriate to law in the state of civilization which that society has reached; and that, conversely, no command or rule of conduct is a law if it does not receive the obedience of the bulk of the society.[1]

This test can readily be applied to existing enactments, but it is not always easy to prophesy whether a command of a new and unprecedented character would be obeyed or not. Inasmuch, however, as the bulk of every society, except in cases of severe social convul-

[1] It may be supposed that, according to this principle, the statutes forbidding the sale of liquor in some of our States are not laws, but that would be going too far, because these acts are by no means disregarded. Persons violating them may perhaps be rarely prosecuted, but the law is strictly enforced by the courts whenever a case is brought before them.

sion, is, from one motive or another, in the habit of obeying what it regards as the law, and is not in the habit of obeying rules which it does not consider law unless they are agreeable, it is sufficiently accurate to say that if the bulk of a society consider that a certain command, if issued by the sovereign, would not be a law, and if they are not disposed to obey it, then such a command would not be a law, and does not lie within the legislative power of the sovereign. The extent, in other words, of sovereign power, is measured by the habit, the opinion, and the disposition of the bulk of the society.

Bentham appears to have held this view of the limitation of sovereignty, although, from some expressions which come after the passage here quoted, it is doubtful whether he distinguished clearly the position of the sovereign from that of a subordinate legislative body. The following extract is from the "Fragment on Government," Chapter IV.: —

"XXXIV. Let us now go back a little. In denying the existence of any assignable bounds to the supreme power, I added, 'unless where limited by express convention:' for this exception I could not but subjoin. Our author (*Blackstone*), indeed, in that passage in which, short as it is, he is most explicit, leaves, we

may observe, no room for it. 'However they began,' says he (speaking of the several forms of government) — 'however they began, and by what right soever they subsist, there is and must be in ALL of them an authority that is absolute. . . .' To say this, however, of *all* governments without exception; — to say that *no* assemblage of men can subsist in a state of government, without being subject to some *one* body whose authority stands unlimited so much as by convention; — to say, in short, that not even by convention can any limitation be made to the power of that body in a state which in other respects is supreme, would be saying, I take it, rather too much: it would be saying that there is no such thing as government in the German Empire; nor in the Dutch Provinces; nor in the Swiss Cantons; nor was of old in the Achæan League.

"XXXV. In this mode of limitation I see not what there is that need surprise us. By what is it that any degree of *power* (meaning *political power*) is established? It is neither more nor less, as we have already had occasion to observe, than a habit of, and disposition to, obedience: *habit*, speaking with respect to *past* acts; *disposition*, with respect to *future*. This disposition it is as easy, or I am much mistaken, to conceive as being absent with regard

to one sort of acts, as present with regard to another. For a body, then, which is in other respects supreme, to be conceived as being with respect to a certain sort of acts limited, all that is necessary is, that this sort of acts be in its description distinguishable from every other.

"XXXVI. By means of a convention, then, we are furnished with that common signal which, in other cases, we despaired of finding. A certain act is in the instrument of convention specified, with respect to which the government is therein precluded from issuing a law to a certain effect: whether to the effect of commanding the act, of permitting it, or of forbidding it. A law is issued to that effect notwithstanding. The issuing, then, of such a law (the sense of it, and likewise the sense of that part of the convention which provides against it being supposed clear) is a fact notorious and visible to all: in the issuing, then, of such a law, we have a fact which is *capable* of being taken for that common signal we have been speaking of. These bounds the supreme body in question has marked out to its authority: of such a demarcation, then, what is the effect? Either none at all, or this: that the disposition to obedience confines itself within these bounds. Beyond them the disposition is stopped from extending: beyond them the subject is no

more prepared to obey the governing body of his own state, than that of any other. What difficulty, I say, there should be in conceiving a state of things to subsist in which the supreme authority is thus limited, — what greater difficulty in conceiving it with this limitation, than without any, I cannot see. The two states are, I must confess, to me alike conceivable: whether alike expedient, — alike conducive to the happiness of the people, is another question."

It is worth while to notice here a difficulty which Austin encounters when he tries to explain the position of a person who is at the same time sovereign in one independent political society and subject in another. "Supposing, for example," he says (Lect. VI. p. 216, 2d ed.), "that our own king were monarch and autocrator in Hanover, how would his subjection to the sovereign body of king, lords, and commons, consist with his sovereignty in his German kingdom? A limb or member of a sovereign body would seem to be shorn, by its habitual obedience to the body, of the habitual independence which must needs belong to it as sovereign in a foreign community. To explain the difficulty, we must assume that the characters of sovereign, and member of the sovereign body, are practically distinct: that, as monarch (for instance) of the foreign commu-

nity, a member of the sovereign body neither habitually obeys it, nor is habitually obeyed by it." But a sovereign possessed of strictly unlimited power can issue to his subject any commands he may please, and inflict punishment in case of disobedience. The sovereign of England, for example, may command his subject, the sovereign of Hanover, under pain of death, to collect taxes in his German dominions and remit them to England. In his attempt to avoid this conclusion Austin concedes the very point at issue, and seems virtually to adopt the theory of sovereignty which has been suggested in the preceding pages; for, by distinguishing between the acts which the king of Hanover performs as subject of England, and those which he performs as sovereign of a foreign country, and saying that the legislative power of England covers only the former, he admits that the British sovereign may have power to issue commands which relate to one class of acts, and at the same time may not have power to issue commands which relate to another. This is nothing less than an admission that the power of the sovereign is not always unlimited. He declares, moreover, that the question whether the legislative power of England extends to the acts of its subject performed as sovereign of Hanover is determined by the

habitual obedience of the subject in that capacity. He considers, therefore, that in this case at least, the extent of the sovereign's power is measured by the habitual obedience of the subject. The same or a similar difficulty is involved in Austin's statement (Lect. VI. p. 323, 2d ed.), that a person may be at the same time completely a member of one independent political society, and for certain limited purposes a member of another; but he makes no attempt to solve it.

If the extent of sovereign power is measured by the disposition to obedience on the part of the bulk of the society, it may be said that the power of no sovereign can be strictly unlimited, because commands can be imagined which no society would be disposed to obey. This may very well be true, and perhaps it would be proper to classify sovereigns, not according as their authority is absolute or not, but according as it is indefinite, or restrained within bounds more or less definitely fixed; for unless the limits of power are tolerably well determined, they tend to stretch farther and farther. Definite limits may be set to sovereign power in either one of two ways: they may result from the rivalry of two independent rulers, who settle by negotiation questions concerning the boundaries of their respective jurisdictions, and

quarrel when they cannot agree; or they may be established by some formal declaration, which by sufficient precision enables the bulk of the society to have a general opinion about the extent of legislative authority, and to distinguish between those commands which fall within the boundaries prescribed and those which do not.

Let us consider the first of these cases. If the sovereign's power to make laws can be limited to a certain class of affairs, it is clear that other matters not within these limits may form the sphere of action of another sovereign, and thus two sovereigns may issue commands to the same subjects, each being supreme in his own department. It may not be always easy in such cases to define accurately the boundaries of each ruler's authority; but this difficulty, which arises from the impossibility of an exact classification of all human actions, is constantly met with in applying the law, and does not affect the proposition that two sovereigns with different spheres of activity may govern the same subjects. The relation of the Church to the various temporal rulers in Europe has been, at times, of the character here described.

The possibility of what I may call a dual sovereignty in one political society suggests an

inquiry into the connection between the terms "sovereign" and "nation." The former is the name given to an independent political superior, considered in relation to his subjects. The latter is applied to the society composed of the superior and the subjects, considered in relation to other independent political societies. Now it is often assumed that these two conceptions are inseparable; that every nation must have one and only one sovereign, and that every sovereign together with his subjects, must constitute a nation: but I think that this is a mistake, because, if as I have urged there can exist within the same territory two sovereigns, issuing commands to the same subjects touching different matters, it may very well happen that one of them has no relations with other independent political societies. It may happen that the authority of a sovereign, in respect to the matters within his competence, extends over several communities, each of which is subject in other matters to an independent political superior of its own, while all the relations with foreign powers fall within the competence of the central government; and in this case the lesser political bodies, although strictly sovereign, could not properly be called nations. I do not assert that this is true of the United States, but merely that there is nothing illog-

ical or impossible in such a state of things, because the proposition that a nation can have only one sovereign, and that every sovereign together with his subjects must constitute a nation, depends upon the hypothesis that the authority of a sovereign is necessarily unlimited, and with that hypothesis it must stand or fall.

The second method in which the limits of sovereign power may be definitely fixed is, by means of a declaration, sufficiently precise to enable the members of the society to distinguish between those commands which fall within the authority of the sovereign and those which do not. Such a declaration can be made in various ways, and in order that it may have the effect proposed, it is only necessary that the bulk of the community should consider all commands issued in excess of the authority set forth invalid, and should not be disposed to obey them. It can be made by means of a convention or compact, as Bentham suggests; or without any compact, by the sovereign himself; by an assembly of citizens when changing the form of government; or by several independent communities when uniting to create a new nation. It is, in fact, conceivable that it might be made without any written instrument at all, by a process of gradual evolution, although such a state of things

is not very likely to occur, and probably would not be permanent. Provided the result I have described is reached, the method of attaining it is quite immaterial.

Several different theories about the political institutions of the United States have been put forward from time to time, but I shall refer to them only for the sake of suggesting the bearing which the foregoing discussion may have upon them. If Austin's doctrines concerning the nature of sovereignty and of law be accepted, only two views of the government of this country can be entertained. Of these, one has been rendered famous by the advocates of extreme States' rights, who considered the State completely sovereign, and maintained that without its own consent (a consent revocable, moreover, at any time) neither the State nor its citizens could be bound by any command of the central government. The other is the extreme national theory, which treats the authority of the States as entirely dependent upon the pleasure of the national sovereign, meaning, of course, by this term, not Congress, but the States in union, the American people, or whoever else the sovereign of the nation may be. If the first of these views is adopted the Constitution must be looked upon as a treaty revocable by any party thereto; if the second,

it is a command issued by the national sovereign, which can be changed at will by him. But if, on the other hand, we reject Austin's theory, we are at liberty to consider the Constitution neither a treaty nor a command, nor even a law at all, but a declaration of the limitations of various sovereign powers, which cannot legally be changed except in the manner provided in the instrument itself. The recent discussion in Rhode Island, of the question whether the constitution of a State can legally be amended, except in the manner prescribed therein, turns in part upon the same principles; because if Austin's theory is sound, a constitution is a law set by the sovereign, who is, in the case we are considering, the electoral body of the State; and it follows that this body must have power to revoke or alter its own commands. But if Austin's theory is wrong, it is possible that there may exist in the State no legislative or sovereign power whatever, except such as is described in the constitution; and if so, neither the voters nor any other body of persons can have any legal authority to make changes in the government, except in accordance with the provisions of that instrument.

It may be worth while, in this connection, to remark that whether, like Austin, we consider a constitution a law set by an absolute sover-

eign, or whether we regard it as a law made without the command of a political superior, or even as no law at all, but simply as a declaration of the existing limits of sovereign power, the effect of an unconstitutional statute is in each case the same; because if a constitution, whatever its origin, is a law of superior authority, every inferior law inconsistent with it must be void; and if without being a law, it is the measure of legislative power, a statute which exceeds the limits prescribed is destitute of legal authority, and is equally invalid. On this point, indeed, and in regard to the functions of courts in dealing with such laws, all these theories are exactly in accord.

In attacking the doctrines concerning sovereignty and law taught by the analytical jurists, I have in reality only been trying to carry out their own principles. Before their day it was customary to seek a foundation for sovereignty in some antecedent right to rule, such as a divine commission or an original compact; and the great change in the theory of government which Bentham and Austin introduced consisted in their assertion, that sovereignty was not a question of right, but of fact; that the sovereign was not the person who had a right to rule, but the person who did, in fact, receive obedience. The argument in the fore-

going pages is an attempt to extend this principle, and to show that the existence of any law is a question of fact. A command or rule of conduct, according to this view, becomes a law, not because it ought to be such, or because it proceeds from a person in other respects sovereign, but only in case it is really obeyed; and in the same way the extent of sovereign power being, like the very existence of sovereignty, a pure matter of fact, depends entirely upon the extent of the obedience actually rendered.

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The Riverside Press
CAMBRIDGE . MASSACHUSETTS
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